Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

SHERYL CRAWFORD,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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188 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether substantial evidence on the whole record supported the conclusion that Petitioner Sheryl Crawford's horse, "Supreme Image," was "sore" at the time of its entry into the Belfast Lions Club Horse Show in accordance with the Horse Protection Act, 15 U.S.C.A. § 1821, et seq.

2. Whether Petitioner Sheryl Crawford had "allowed" the entry of a "sored" horse in violation of the Horse Protection Act, 15 U.S.C.A. § 1821, et seq.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals were the United States Department of Agriculture and Sheryl Crawford.

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No.

In The

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SHERYL CRAWFORD,

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vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sheryl Crawford, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

REFERENCE TO REPORTS OF OPINIONS

In addition to the published opinion of the United States Court of Appeals for the District of Columbia Circuit, *Crawford v. United States Department of Agriculture*, 50 F.3d 46 (D.C. Cir. 1995), decided March 31, 1995, (which is sought to be reviewed by this Honorable Court by this Petition) the following opinions were rendered in this case:

(1) January 30, 1992, Decision and Order by the Honorable USDA Administrative Law Judge Paul Kane (copy included in Appendix);

(2) October 22, 1992, Remand Order by the Honorable USDA Judicial Officer Donald A. Campbell (copy included in Appendix);

(3) January 29, 1993, Revised Initial Decision and Order by the Honorable Administrative Law Judge Paul Kane (copy included in Appendix); and

(4) November 19, 1993, Decision and Order as to Sheryl Crawford by the Honorable USDA Judicial Officer, Donald A. Campbell (copy included in Appendix).

STATEMENT OF JURISDICTION

Petitioner respectfully requests this Honorable Court to review the opinion of the United States Court of Appeals

for the District of Columbia Circuit decided on March 31, 1995, pursuant to jurisdiction vested therein by 28 U.S.C. § 1254.

STATUTES

This case involves the following statutes. (The text of which are set forth in the appendix hereto.)

(a) The following Statutes:

(1) "The Horse Protection Act," 15 U.S.C.A. § 1821-1831.

STATEMENT OF THE CASE

This case stems from a Complaint, filed by the Animal and Plant Health Inspection Service ("APHIS"), alleging that Petitioner, Sheryl Crawford, violated the Horse Protection Act ("the Act"), 15 U.S.C.A. § 1821, et seq. Petitioner allegedly violated 15 U.S.C.A. § 1824 (2) (D) by "allowing" the entering for purposes of showing a "sore" horse, "Supreme Image," at the Belfast Lions Club Horse Show at Belfast, Tennessee on August 1, 1986.

More than four years later, on September 28, 1990, APHIS filed its initial complaint against Petitioner alleging that a violation of the Act had occurred on August 1, 1988. Petitioner filed a timely answer denying the material allegations against her. On January 25, 1991, APHIS filed an Amended Complaint alleging that the violation occurred on August 1, 1986. An administrative hearing was held in

Atlanta, Georgia on June 27, 1991 before the Honorable Administrative Law Judge, Paul Kane. Upon consideration of all oral and documentary evidence presented, the Administrative Law Judge ("ALJ") entered an Initial Decision and Order on January 30, 1992, in which the Complaint as against Petitioner was dismissed.

Appeal from the ALJ's Initial Decision and Order was taken by APHIS, the Complainant. Donald A. Campbell, the Judicial Officer ("JO") presiding over the administrative appeal, entered his Remand Order on October 22, 1992. The ALJ issued a Revised Initial Decision and Order on January 29, 1993, wherein he concluded "Supreme Image" was "sore" within the meaning of the Act and that Petitioner had "allowed" the entry of the "sore" horse. Petitioner appealed this decision to the JO who issued a final Decision and Order as to Sheryl Crawford on November 19, 1993.

The JO's final Decision and Order as to Sheryl Crawford set forth an assessment of a civil penalty of $2,000.00 against Petitioner and disqualified her for one year from showing, exhibiting, entering, or otherwise participating in any horse show, exhibition, sale or auction.

Petitioner subsequently filed an appeal with the United States Court of Appeals for the District of Columbia Circuit pursuant to 15 U.S.C.A. § 1825 (b)(2). Oral arguments were heard on February 7, 1995. In its Decision dated March 31, 1995, the United States Court of Appeals for the District of Columbia Circuit denied Petitioner's petition for review of the Department's order.

ARGUMENT

Petitioner respectfully requests that the Honorable Supreme Court of the United States of America grant this Petition for Writ of Certiorari to determine once and for all the proper procedure and application of the Horse Protection Act. 15 U.S.C.A. § 1821, et seq.

The Horse Protection Act (the "Act") was made into federal law in 1970 and subsequently amended in 1975. In the twenty-five years of its existence, the Act, has never been brought before this Honorable Court for interpretation. However, the Federal Circuit Courts with jurisdiction over states that are prevalent in the Tennessee Walking Horse[1] industry, have acted inconsistently with the language of the Act and in light of each other's decisions regarding the Act. The questions presented for review in this case involve important issues of federal law that have not been but should be resolved by this Court as they affect the lives of a multitude of people actively participating in the Tennessee Walking Horse industry. This industry is a multi-million dollar industry throughout more than ten states.

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1. The Tennessee Walking Horse is popularly known for its characteristic high stepping gait. These horses are bred, trained and shown for competition and pleasure.

I. WHETHER SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTED THE CONCLUSION THAT PETITIONER SHERYL CRAWFORD'S HORSE, "SUPREME IMAGE," WAS "SORE" AT THE TIME OF ITS ENTRY INTO THE BELFAST LIONS CLUB HORSE SHOW IN ACCORDANCE WITH THE HORSE PROTECTION ACT, 15 U.S.C.A. § 1821, ET SEQ.

Before competition at the Belfast Lions Club Horse Show, Petitioner's Horse, "Supreme Image," was inspected by the Designated Qualified Person ("DQP"), Charles Thomas to determine whether the animal had been "sored."[2] The DQP rejected the horse and subsequently, two USDA Veterinary Medical Officers ("VMOs"), Drs. Knowles and Riggins, examined "Supreme Image" to determine whether there was compliance with the Act. The two VMOs examined "Supreme Image" separately using a technique known as "digital palpation."[3] After examination, the two VMOs determined that "Supreme Image" was sore and

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2. The DQP is hired by the management of a show to inspect participating horses in order to protect itself from potential liability. If a "sore" horse is allowed to participate in the show and a DQP was not utilized, the show management could be potentially liable. *Elliott v. Administrator, Animal & Plant Inspection Serv.*, 990 F.2d 140, 142 n. 4, (4th Cir.), *cert. denied*, – U.S. –, 114 S.Ct. 191, 126 L.Ed.2d 149 (1993).

3. This technique involves the pressing of the thumb or fingers into the flesh of the horse's leg. By means of this technique, in theory, if the VMO obtained a pain response, there was to be an indication of soring.

disqualified the animal and Petitioner from competition. The two VMOs prepared a USDA form entitled "Summary of Alleged Violations" ("SAV"). This form contained the VMOs findings as to the reactions to the digital palpation. The SAV was signed by both VMOs, who inspected the horse separately. The contents of the report referred to the pain response allegedly obtained by the VMOs after palpation and a diagram of where allegedly on the horse's limbs, the pain response was focused. On August 4, 1986, Dr. Knowles prepared and signed an affidavit describing the examination and on August 15, 1986, Dr. Riggins did the same. *Crawford v. United States Department of Agriculture*, No. 93-1852, 50 F.3d 46, 1995 U.S. App. LEXIS 6418, at *7 (D.C. Cir. Mar. 31, 1995).

The Horse Protection Act sets forth the standard of review for the appellate court to be bound by when reviewing the decision of the Secretary. 15 U.S.C.A. § 1825 (b)(2) states that "the findings of the Secretary shall be set aside if found to be unsupported by substantial evidence." *See Young v. United States Department of Agriculture*, No. 94-40818, 1995 U.S. App. LEXIS 13862 (5th Cir. June 7, 1995). Section 10 (e) of the Administrative Procedure Act allows a reviewing Court to set aside any agency actions which are arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966). This Court has defined substantial evidence to include relevant evidence that should be enough to justify, in a trial by jury, a refusal of directed verdict when the conclusion to be drawn from the evidence is a

question of fact. *Id.* at 620. *See also, National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939). The case at bar demonstrates that there is a lack of substantial evidence to support a finding of a violation of the Act.

The sole evidentiary basis supporting the Complaint against Petitioner was contained in the report and affidavits of the VMOs. *Appendix A*, 10a. The ALJ initially dismissed the Complaint against Petitioner reasoning that the report and affidavits of the VMOs constituted hearsay since the VMOs had no present recollection of their examination of the horse at the time of the hearing in Atlanta, Georgia, almost five years later. *Appendix A*. The JO issued a Remand Order stating that the ALJ had asked for too much and reasoned that "the past recollection recorded was to be considered reliable, probative and substantial evidence and would fulfill the requirements of the Administrative Procedure Act, if the affidavits were made while the events recorded were fresh in the witnesses mind." (Citations omitted) *Appendix B*.

This Court has held that in determining whether hearsay can constitute substantial evidence, there must be an inquiry into factors which would assure underlying reliability and probative value. *Richardson v. Perales*, 402 U.S. 389 (1971). This Court has also held that in determining whether an administrative order is based on substantial evidence, the reviewing court must consider whatever in the record fairly detracts from the weight of the evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

The ALJ properly determined that the report and affidavits of the VMOs were not supported by any other secondary or corroborative evidence. As the ALJ noted, "[t]he Government veterinarians were not able to refer to any notes or other contemporaneous recordings linking their observations of August 1, 1986 to [the SAV and affidavits prepared afterwards.]" *Appendix A*, 11a-12a. Thus, the ALJ found this evidence of the record as lacking the corroboration necessary "to sustain the ultimate conclusion for which they were offered as evidence, i.e., the conclusion that respondent's animal was sore on August 1, 1986." *Appendix A*, 12a.

Both VMOs testified that they do not routinely complete a SAV form for every horse they examine. As a general practice, VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. Also, the VMOs are instructed by the Department how to complete the SAV and affidavits so that they would serve the purpose for which they were intended, namely to support a Complaint brought under the Act. *Young v. United States Department of Agriculture*, No. 94-40818, 1995 U.S. App. LEXIS 13862, at *6 (5th Cir. June 7, 1995). There are a line of cases decided by this Court as well as by the Circuit Courts holding that documents that are prepared specifically for use in future litigation are inherently unreliable. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *United States v. Stone*, 604 F.2d 922 (5th Cir. 1979); *United States v. Blackburn*, 992 F.2d 666 (7th Cir.), *cert. denied*, 114 S.Ct. 393 (1993).

In *Palmer v. Hoffman*, this Court held that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation. This analysis was also applied by the Fifth Circuit in *United States v. Stone*. The Fifth Circuit held that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared at least partially in anticipation of litigation. 604 F.2d at 925. The above cases were governed by Federal Rule of Evidence 803. Even though the Federal Rules of Evidence are not binding on the Secretary in administrative proceedings, the same analysis should apply in evaluating the reliability of hearsay for the purpose of determining whether such hearsay constitutes substantial evidence. *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981).

The District of Columbia Circuit has held that hearsay evidence need only bear a satisfactory indicia of reliability and can constitute substantial evidence if reliable and trustworthy. *Johnson v. United States*, 628 F.2d 187 (D.C. Cir. 1980); *Hoska v. United States Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982). The ALJ did not find the report or affidavits trustworthy evidence and based his initial decision of dismissing the Complaint against Petitioner on such finding. The ALJ noted a number of factors which he decided contributed significantly to the lack of trustworthiness of the hearsay documents presented by the Department. These factors included an incorrect exhibitor number on "Supreme Image," the lapse of time

between the actual examination and the documentation of such examination of "Supreme Image" by the VMOs, the characteristic of the routine matter recorded and the "raucous environment of the examinations." *Appendix A*, 17a. The ALJ also was concerned with the absence of a specific entry as to the date of the preparation of the SAV and any indication that Petitioner's horse had been excused from the event. *Id.*. The ALJ also determined that even though the VMOs were available to testify to supplement the affidavits, the VMOs had no recollection of the details of the examination of "Supreme Image" on August 1, 1986.[4]

The method of determining whether a horse was "sore" was attacked as having a lack of trustworthiness by Petitioner. "Digital palpation" was used by the VMOs while examining "Supreme Image." The reliability of this method had been disputed for a number of years. In a recent Appropriations Act, Congress included a rider on the Department's appropriation:

> For expenses, ... to carry out inspection, quarantine, and regulatory activities; ... $432,900,000, ... provided further, that none of these funds shall be

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4. There was testimony offered by Petitioner, her husband, her trainer and a friend as to the horse's condition and as to the conditions surrounding the examination. Petitioner testified to the fact that she overheard Dr. Riggins tell Dr. Knowles that he could not find anything wrong. Petitioner's other witnesses testified as to other reasons why "Supreme Image" may have been agitated and reacted the way it did. *Appendix A*

> used to pay the salary of any Department Veterinarian, or [VMO] who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act [], relies solely on the use of **digital palpation** as the **only** diagnostic test to determine [if a horse is sore under the Act.] *Crawford v. United States Department of Agriculture*, No. 93-1852, 1995 U.S. App. LEXIS 6418 at *10 (D.C. Cir. Mar. 31, 1995), *citing*, Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992) (emphasis added).

The court disregarded Petitioner's argument stating that it cannot obviously be influenced by Congress' subsequent actions. The court went further to state that the legality of the Department's decision has to be judged by the law in effect at the time of the inspection and proceeding. *Id.* at *11. However, even though Congress' recent dictates do not bind an ALJ or a JO, they do offer a support for the conclusion that a diagnoses based solely on digital palpation is not reliable.[5]

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5. Petitioners Bill Young and Floyd Sherman made a similar, successful argument to the Fifth Circuit Court of Appeals. The events giving rise to the elements of the Young and Sherman case occurred in August, 1990, well before the passage of the abovementioned Appropriations rider for the USDA. *Young*, 1995 U.S. App. LEXIS 13862.

II. WHETHER PETITIONER SHERYL CRAWFORD HAD "ALLOWED" THE ENTRY OF A "SORE" HORSE IN VIOLATION OF THE HORSE PROTECTION ACT, 15 U.S.C.A. § 1821, ET SEQ.

The Act, pursuant to 15 U.S.C.A. § 1824 (2)(D), prohibits the following conduct:

> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore[6], (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, ... (D) allowing any activity described in clause (A), (B) or (C) respecting a horse which is sore by the owner of such horse...

The Act was passed by Congress in 1970 in response to the concern of inhumane practices toward horses. The purpose of the Act is two-fold. The Act prohibits "soring not only to prevent [excruciating] pain to the animals, but also to prevent owners who allow their trainers to sore their horses from gaining an unfair competitive advantage over trainers who relied on skill and patience." *Rowland v. United States Department of Agriculture*, 43 F.3d 1112, 1116 (6th Cir. 1995). *See also, Elliott v. Administrator, Animal & Plant Health Inspection Service*, 990 F.2d 140

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6. See, 15 U.S.C.A. § 1821 (3). *Appendix F*, 145a.

(4th Cir 1993), *cert. denied*, 126 L.Ed.2d 149, 114 S.Ct. 191 (1993).

Congress, in passing the Horse Protection Act, has attempted to curb and ultimately end the inhumane practice of soring horses so as attain an unfair competitive advantage. Petitioner had given a direct instruction to her trainer not to sore any of her horses. Petitioner testified to this instruction at the oral hearing in Atlanta, Georgia and her testimony was not contradicted by the government. *Crawford*, No. 93-1852, 1995 U.S. App. LEXIS 6418 at *12. JO, Donald A. Campbell gave significant credence to Petitioner's prophylactic instruction to her trainer not to sore her horses. The JO stated that, "I fully believe Respondent's testimony...that she instructed her trainer not to sore her horse, or injure it in any manner." *Appendix D*, 95a.

The interpretation of the Act and specifically of the issue of the conduct of the horse owner in "allowing" the entry of a sore horse has been discussed at length in both the Eighth and Sixth Circuits. As the District of Columbia Circuit correctly noted:

> [Both the Eighth and Sixth Circuits] have rejected the Department's interpretation and have held that if an owner produced uncontradicted evidence that he or she instructed a trainer not to sore the horse, the Department must in turn show that the instruction was a ruse or that the owner nevertheless had knowledge that the horse was sore. *Crawford*, No.

93-1852, 1995 U.S. App. LEXIS 6418, at *12 (Citing *Burton v. United States Department of Agriculture*, 683 F.2d 280 (8th Cir. 1982) and *Baird v. United States Department of Agriculture*, 39 F.3d 131 (6th Cir. 1994).)

This issue first was discussed in the Eighth Circuit Court of Appeals in *Burton*. The issue in *Burton* is almost identical to the issue being presented to this Honorable Court for review. The Court held that "absent clear, expressed intent by Congress to hold owners of horses strictly liable for [a] violation of [the Act]" there cannot be a finding that the owner allowed a "sore" horse to be shown. *Id.* at 283.

The Sixth Circuit Court of Appeals discussed this similar issue in *Baird v. United States Department of Agriculture*. The Sixth Circuit analyzed the definition of the word "allow" in its decision concerning the applicability of the Act to a horse owner, who similarly to Petitioner, allegedly "allowed" the entry of a sore horse. The Court, in light of the definition of the word "allow" as set forth in Black's Law Dictionary,[7] reasoned that the interpretation of

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7 [Allow] has no rigid or precise meaning, its import varying according to circumstances or context in connection with which it is used. It may mean to bestow or assign to any one as his right or due. To approve of, accept as true, admit, concede, adopt or fix. To grant something as a deduction or an addition; to abate or deduct; as, to allow a sum for leakage. To sanction, either directly or indirectly, as opposed to merely suffering a thing to be done; to acquiesce in; to tolerate. *Baird*, 39 F.3d at 137 (citing Black's Law Dictionary 76 (6th ed. 1990).

"allow" would not be encompassed by the definition. The Court noted the two ways to basically allow something to happen. One could allow "directly" by "explicitly condoning the conduct or act in question," or "indirectly" by "looking the other way." *Id.* The Court determined correctly that unless an owner had created an atmosphere conducive to soring or had done nothing to dissuade the practice of soring liability would not follow. *Id.* The government would fail to establish pretext if there was no offering of evidence by the government contradicting the testimony of the owner who avers that a prophylactic instruction was given to the trainers or anyone "not to sore the horses." *Id.* at 138.

The Sixth Circuit determined that if Congress had intended to establish a "strict liability scheme" with regard to § 1824 (2) (D) of the Act, it could have done so with clear and unambiguous legislative language. *Id.* at 137. The Court established that the language of the Act does not allow such an interpretation.

The District of Columbia Circuit Court was unreasonable with its disagreement with the *Baird* decision and the line of cases which have spoken directly or indirectly on the issue of the "strict liability" of owners.[8] Petitioner specifically ordered her trainer not to sore her

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8. In addition to the decisions set forth in *Baird* and *Burton*, compare *Stamper v. Secretary of Agriculture*, 722 F.2d 1483 (9th Cir. 1984) and *Thornton v. United States Department of Agriculture*, 715 F.2d 1508 (11th Cir. 1983).

horses. This was the testimony of Petitioner at the time of her hearing before the Administrative Law Judge and as stated above, this testimony was afforded credence by the Judicial Officer Donald A. Campbell. There was no evidence presented by the Department to rebut Petitioner's testimony.

There is a general consensus among the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits as to the interpretation of the Act as it applies to owners and their liability when alleged to have "allowed" the entry of a sore horse. Generally, unless an affirmative act is undertaken by the horse owner who is allegedly in violation of the Act, the owner would not be held liable.

The District of Columbia Circuit was concerned with the enormous burden and expense that the Administrator would have to incur to establish how the horse became to be sore. The Court went as far as to state that just because an owner may offer evidence of her prophylactic instruction to the trainer "not to sore her horses," the Administrator should not have to "shoulder" the burden of proving authorization of the soring. This determination is not only unreasonable in light of the recent Circuit decisions, but is a blatant and unjust bias toward the Department. The Administrative Procedure Act tends to alleviate and relax the rules governing the proceedings before the Secretary[9].

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9. As noted above, for example, hearsay would be generally admissible as long as there is an indicia of trustworthiness. *Compare*, Federal Rules of Evidence, Rule 803.

making such proceedings more efficient. The "shifting of the burden" to the Department to contradict the testimony of the owner's prophylactic instruction should not be viewed as an excessive expense and burden. Justice and one's right to a fair judicial process cannot be discounted. To require the Department to offer evidence of pretext does not undermine the spirit of the Act and its enforcement procedures.

CONCLUSION

This is a case of first impression for this Honorable Supreme Court of the United States of America. The twenty-five year old Horse Protection Act has yet to be interpreted by this Court. In light of the inconsistencies among the Circuits, the time has come for this Court to utilize its supervisory powers. The Tennessee Walking Horse industry is a multi-million dollar industry. The citizens who participate as breeders, trainers, exhibitors or just as "fans," number in the millions. The livelihood of many of these citizens is being denied by a misinterpretation of the statute as well as a misapplication of the procedures in place to facilitate enforcement of the statute.

Petitioner has been the subject of civil punishment due to the confusion of the courts in interpreting the proper procedure and application of the statutes and rules which most affect her ability to utilize her horses.

Petitioner, therefore, respectfully requests that a Writ of Certiorari issue so that this Honorable Court may once and for all clarify the confusion and mend the inconsistencies that will continue without its supervisory power.

Respectfully submitted, this 29th day of June, 1995.

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APPENDIX A — INITIAL DECISION AND ORDER DATED MARCH 30, 1992.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
Cecil Jordan,	)	
Sheryl Crawford, and	)	
Ronald R. Smith,	)	
	)	
Respondents	)	HPA Docket No. 91-23

Initial Decision and Order

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L 89-554, September 6, 1966, 80 Stat. 384, as amended[1], the Rules of Practice governing proceedings under the Horse Protection Act, 9 C.F.R. §§ 12.1-.10 (1991), and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R.. §§ 1.130-.151 (1991).

The Administrator of the Animal and Plant Health Inspection Service of the Department of Agriculture, by complaint filed September 28, 1990, and amended January

1. Particular reference is made to 5 U.S.C.A. §§ 554, 557 (West 1977 and Supp. 1991). [Unofficial codification of statutes are cited herein.]

25, 1991, alleges that on August 1, 1986, respondent[2] Sheryl Crawford, allowed a horse owned by her to be entered in a show while the horse was sore, in violation of the Horse Protection Act, Pub. L. 91-540, December 9, 1970, 84 Stat. 1404, as amended[3] (hereinafter the "Act"). The Administrator seeks the imposition of civil penalties and the disqualification of respondent from participation in the horse industry for a period of time. By answer filed February 11, 1991, Ms. Crawford, through counsel, denies the essential allegations of the complaint.

An oral hearing was held on June 27, 1991, in Atlanta, Georgia, before the undersigned. Subsequently, proposed findings and briefs were filed by counsel. To the extent indicated, they are adopted herein. All other proposed findings, conclusions and arguments are rejected as irrelevant or lacking legal or evidentiary bases. As used herein, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complainant's counsel. "RX" refers to the numbered exhibits offered by respondent's counsel.

The interests of the Department are represented by Donald A. Tracy, Esq., Washington, D.C. The interests of respondent are represented by J. Thomas Vance, Esq., Carrollton, Georgia.

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2. A decision and order as to respondent Ronald R. Smith was issued December 18, 1990. A decision and order as to respondent Cecil Jordan was issued April 17, 1991.

3. 15 U.S.C.A. § 1821, *et seq.* (West 1982 and Supp. 1991).

Appendix A

Upon consideration of all matters of record, proof as to respondent, Sheryl Crawford, has failed and the complaint is dismissed.[4]

Statutes

The following statutory provisions are applicable to this case:

As used in this chapter unless the context otherwise requires:

* * * * * *

(3) The term "sore" when used to describe a horse means that --

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term

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4 The failure of proof has long been recognized as a basis upon which complaints may be dismissed. *Joe H. Dietz*, HPA 165, 42 Agric. Dec. 238, 239 (February 24, 1983).

does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the state in which such treatment was given.[5]

* * * * * * *

The following conduct is prohibited:

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse,[6]

* * * * * * *

(d) . . .(5) In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[7]

* * * * * * *

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5. 15 U.S.C.A. § 1821(3)(D) (West 1982 and Supp. 1991).

6. 15 U.S.C.A. § 1824(2) (West 1982 and Supp. 1991).

7. 15 U.S.C.A. § 1825(d)(5) (West 1982 and Supp. 1991).

Appendix A

(b)(l) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation.[8]

* * * * * *

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who . . . (a) . . . paid a civil penalty assessed under subsection (b) . . . for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation . . .[9]

Findings of Fact

1. Sheryl Crawford is an individual whose mailing address is 105 Corporate Drive, Carrollton, Georgia, 30117. (Amended Complaint, Tr. 172)

2. At all times relevant herein Sheryl Crawford was the sole owner of the horse known as "Supreme Image." (Admitted, Answer, Tr. 174)

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8. 15 U.S.C.A. § 1825(b)(1) (West 1982 and Supp. 1991).

9. 15 U.S.C.A. § 1825(c) (West 1982 and Supp. 1991).

Appendix A

3. The horse, "Supreme Image," was entered as Entry No. 660, Class 18, on August 1, 1986, in the Belfast Lions Club Horse Show in Belfast, Tennessee. (Amended Complaint; Answer; CX 1, CX 2, CX 3) However, "Supreme Image" was not shown. (Tr. 159, 178)

4. On August 1, 1986, the horse "Supreme Image" was examined by the Designated Qualified Person ("DQP"), Charles Thomas, when entered to show, and the DQP ordered the horse not to show. (CX 2, CX 3) Mr. Thomas utilized the correct numeral identifying "Supreme Image." (Tr. 216)

5. Two Government veterinarians, Drs. Riggins and Knowles, each signed the VS Form 19-7 (CX 1) and each signed an affidavit (CX 2, CX 3), asserting that the horse, "Supreme Image," was examined by them and diagnosed as "sore," on August 1, 1986.

6. The Government veterinarians who signed the VS Form (CX 1) and affidavits (CX 2, CX 3) testified in 1991 that they had no, then present, recollection of their 1986 examination of the horse or of making the report or affidavits, beyond the information contained in the documents. (Tr. 28, 32, 43, 52-53, 85, 90-94)

7. The Government veterinarians who signed the report and affidavits regarding their examinations and diagnoses, testified as to their normal protocol followed in their examinations and the preparation of the VS Form (CX 1) and affidavits. (CX 2, CX 3; Tr. 28-30, 59, 85, 92, 94)

Appendix A

8. The VS Form 19-7, the examination report regarding the examination of "Supreme Image" contained no specific indication of the date on which it was prepared (CX 1, Tr. 68-69) contained an erroneous entry as the exhibitor numeral and was further incomplete in that the document did not reflect that the horse had been excused from the exhibit by Mr. Thomas. (CX 1; Tr. 55, 212) Dr. Riggins acknowledged that information from this form was used in preparation of his affidavit. (CX 3; Tr. 31)

9. The affidavit of Dr. Riggins was dated August 15, 1986, fourteen days following the show. (CX 3)

10. The affidavit of Dr. Knowles was dated August 4, 1986, three days following the show and contained a corrected and initialed entry as to exhibitor numeral. (CX 2)

11. No complaint pertaining to the August 1, 1986, show was filed until the autumn of 1990. (Tr. 194)

12. Respondent, Sheryl Crawford testified in 1991 on the basis of a then present recollection of the 1986 events. (Tr. 178-186)

13. Respondent testified that only one of the Government veterinarians, Dr. Riggins, physically examined the horse, "Supreme Image," on August 1, 1986. (Tr. 184, 201)

14. Respondent's husband testified that no other examination of the horse took place prior to respondent's arrival at the examination location. (Tr. 132, 160)

Appendix A

15. The Government veterinarian testified that normal procedure requires that a horse will not be written up as "sore" unless two veterinarians examine the horse and concur in the diagnosis. (Tr. 80)

16. Respondent testified that during the examination of the horse, Dr. Riggins made a statement to the effect that he could not find anything wrong. (Tr. 182)

17. Respondent, and the horse's trainer testified that on the night of the show the horse had been confined with a mare "in season" for several hours proceeding the examination. (Tr. 124, 177-178)

18. Respondent and the horse's trainer testified that on the night of the show the horse was exceptionally agitated. (Tr. 125, 129, 178-179, 185)

19. Dr. Knowles admitted that if a horse is agitated that fact can affect his diagnostic opinion: (Tr. 98)

20. Dr. Knowles acknowledged that the night of the show was a busy night in the inspection area. (Tr. 86)

21. Respondent and respondent's witnesses testified that the period during which the veterinarians were examining the horse lasted from one to two hours. (Tr. 115, 161, 185-186)

22. Dr. Riggins acknowledged that one and one half hours would not be a reasonable length of time-for an examination. (Tr. 62)

23. The horse was shown at an exhibition in Wartrace, Tennessee, on August 2, 1986, the night following that on which the subject conduct was alleged to have

occurred. Inspection by the same DQP, Charles Thomas, and by one of the Government's witnesses, Dr. Knowles failed to result in a diagnosis of "sore" at that time. (Tr. 188-189)

24. Respondent exhibited her horse on August l, 1986, as a recreational activity. (Tr. 174) Ms. Crawford's source of income is unrelated to the horse industry and any sanction imposed as a-result of these proceeding would imperil a license from the State of Georgia necessary to the pursuit of her insurance underwriting business. (Tr. 173, 190-191) No other allegation as to any violation of the Act has ever been advanced against Ms. Crawford. (Tr. 215) Ms. Crawford fully cooperated with the Department's veterinarians and investigators in the performance of their official duties. (Tr. 185, 193, 205, 233)

Conclusion

Based upon an evaluation of all evidence, the entry of findings above and the application of applicable law, it is determined that the evidence of record fails to support the legal conclusion that "Supreme Image" was sore when its owner, Sheryl Crawford allowed its entry into the Belfast Lions Club Horse Show at Belfast, Tennessee, on August 1, 1986.

Appendix A

Discussion

The sole evidentiary basis supporting this complaint is contained in the examination report and affidavits of the Government veterinarians. (CX 1, CX 2, CX 3)[10] These exhibits were offered to support complaint counsel's contention that respondent's horse was sore on August 1, 1986. However, the Government veterinarians had no present recollection of their examination of the horse at the time of their testimony at hearing, and so, CX 1, CX 2, CX 3, constitute hearsay. They were admitted in this proceeding under the Rules of Practice, 7 C.F.R. § 1.141 which does not exclude probative hearsay, meeting the requirements of fundamental fairness.[11] Similar records are

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10. CX 4 was admitted into the record solely for the impeachment of the testimony of the witness, Cecil Jordan. (Tr. 148-149) Since this document was received only for a specific limited purpose, the contents of this statement do not constitute substantive evidence in spite of the reference in complaint counsel's brief suggesting the contrary. (Brief for Complainant at 10) *See, 3 J. WIGMORE, EVIDENCE,* § 1018 at 997-998 (proclaiming "orthodox view," widely, though not universally followed, to be that prior self-contradictions are not to be treated as having any substantive or independent testimonial value) (emphasis in original). *Accord, United States v. Day,* 789 F.2d 1217 (6th Cir. 1986) (finding that proponent of prior inconsistent statement pursuant to Fed. R. Evid. 801(d)(1)(A), the exception allowing admission of statements made under oath, subject to penalty of perjury, at other proceeding, has affirmative burden of showing that individual administering oath had authority to invoke penalty of perjury). *But see, United States v. Castro-Ayon,* 537 F.2d 1055 (9th Cir.) *cert. denied,* 429 U.S. 983 (1976) (admitting as substantive evidence prior inconsistent statement recorded at immigration interrogation and concluding that Congress intended other proceeding to include immigrating interrogation).

11. *See also, Martin-Mendoza v. INS,* 499 F.2d 918, 921 (9th Cir. 1974) *cert. denied,* 419 U.S. 1113, *reh'g denied,* 420 U.S. 984 (1975) (stating

often admitted at trial under the past recollection recorded exception to the hearsay rule. Fed. R. Evid. 803(5)[12]

These documents which may be described as responsible hearsay are not enhanced by support from secondary records. Such records do not exist. (Tr. 31-32) The Government veterinarians were not able to refer to any

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that the test for admission of hearsay in administrative proceedings are fundamental fairness an probativeness).

12. Rule 803(5) of the Federal Rules of Evidence provides as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * * * *

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Even though the Department of Agriculture has declined to follow the federal rules in its administrative proceedings, *James K Hickey, et al.*, AWA Docket No. 369, 47 Agric. Dec. 840, 850 (May 27, 1988) ("Hickey I"), the rationale of the Federal Rules of Civil Procedure has been adopted to support the results reached in administrative adjudications. *Miguel A Machado, et al.*, P&S Docket No. 5943, 42 Agric. Dec. 820, 846 (June 28, 1983) *aff'd, Cozzi v. US. Dep't of Agriculture*, 749 F.2d 36 (9th Cir. 1984) ". . . [c]ourts have consistently held that agencies need not observe all the rules and formalities applicable to court room proceedings." *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1985).

notes or other contemporaneous recordings linking their observations of August 1, 1986, to CX 1, CX 2 and CX 3. Hence, the hearsay evidence of this record lacks the corroboration necessary to sustain the ultimate conclusion for which they were offered as evidence, i.e., the conclusion that respondent's animal was sore on August 1, 1986. The Department's Judicial Officer has written:[13]

> Whether hearsay is enough to support a finding of fact without corroboration depends on the importance of the particular fact to the ultimate conclusion (i.e., the less the importance of the fact, the more likely it can be supported only by hearsay) and whether better evidence was readily available. *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 962 (1982); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1041 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976) . . .

The concerns which arise in the consideration of past recollection recorded derive from the problems which are inherent in all hearsay and which are the basis of the rule requiring the exclusion of hearsay.[14] At the time the record

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13 . *Dr. Dane O. Petty*, VA Docket No. 21, 43 Agric. Dec. 1406, 1465 (October 31, 1984).

14 . "Hearsay testimony is from the very nature of it attended with . . . doubts and difficulties and it cannot clear them up. 'A person who relates a hearsay is not obligated to enter into any particulars, to answer

is made, the validity of the statement and the demeanor of the witness is not subject to the scrutiny of cross-examination, the crucial "security for the correctness and completeness of testimony."[15] Cross-examination of the proponent of the record at testimony provides only a limited and delayed scrutiny of factors which bear upon his candor and narrative ability.[16]

The touchstone for admission of evidence as an exception to the hearsay rule has been the existence of circumstances which attest to its trustworthiness.[17] The Advisory Committee's Note to Exception (5) (Past recollection Recorded)[18] clearly indicates that the method of establishing the initial knowledge of the declarant and the accuracy of the material sought to be introduced must be determined from the circumstances of each case.[19] Care is

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any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities. . . .'" *Coleman v. Southwick*, 9 John 50 (N.Y. 1812) (quoting Chancellor Kent) quoted in 5 J. WIGMORE, EVIDENCE, § 1364 at 6.

15. MCCORMICK ON EVIDENCE, § 245 at 728 (1984 & Supp. 1987) (quoting Bentham).

16. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 445 at 618 (1980 & Supp. 1991). *See also, United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979) (stating that witness asserting lack of recollection of contents of statement provides virtually no opportunity for cross-examination, since memory of substantive matter could not be probed).

17. *United States v. Williams*, 571 F.2d 344, 350 (6th Cir.) *cert. denied*, 439 U.S. 841 (1978).

18. Fed. R. Evid. 803 advisory committee's note, 28 U.S.C. app. at 779 (1988).

19. *United States v. Williams*, 571 F.2d at 350.

to be exercised regarding hearsay testimony which lacks sufficient extrinsic, safeguards of trustworthiness.[20]

There are two requirements which apply to admission of and reliance on past recollections recorded under the federal rules;[21] accuracy and freshness. They are equally important factors in the consideration of such evidence in this proceeding.

Statements constituting past recollection recorded must accurately reflect the prior first hand knowledge of the witness.[22] Where, as in the instant case, the witness cannot recall preparing the record because it is one of many substantially identical records routinely prepared in the course of his profession, the requirement of accuracy is frequently established, if the witness testifies that in such situations he follows certain steps or uses a certain method, and this testimony indicates to the judge that the record is an accurate reflection of the witness' previous knowledge.[23] However, the level of certainty is of a lower quality in this circumstance than where the witness recalls making the statement and asserts that he verified its correctness at the

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20. *United States v. F.M.C. Corp.*, 306 F. Supp. 1106, 1138 (E.D. Pa. 1969).

21. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 445 at 618-642.

22. *United States v. Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978), *later app.* 581 F.2d 553 (5th Cir. 1978).

23. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 445 at 625.

time.[24] A general assertion that the witness would not have signed the statement if it had not been correct does not fulfill the requirement if the accuracy is suspect.[25] "Truth" or "accuracy" clauses, including formal affidavit form do not enable a statement to verify itself.[26] Some indication of the accuracy of the statement must be included in the witness' testimony.[27] Generally the witness must affirm that he knew it to be true at the time the statement was made.[28] There can be no intention to allow trial by affidavits with the only function of the maker of the affidavit to testify to lack of recollection.[29] The caution with which recorded recollection is treated is reflected in the fact that, under the federal rules, the exhibit is not available to the jury in their deliberations, but is only allowed to be read into evidence by the witness. This provision has been interpreted as an effort to avoid an inappropriately strong impression from the written word.[30]

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24. J. WIGMORE, EVIDENCE, § 747 at 98 (1970 & Supp. 1982).

25. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 445 at 626-627.

26. D. LOUISELL & C. MUELLER, § 445 at 628-629.

27. Although Fed. R. Evid. 803(5) does not expressly require that the maker attest to the accuracy of the statement at testimony, a positive showing of accuracy is properly required. 3 J. WIGMORE, EVIDENCE, § 745 at 94.

28. 3 J. WIGMORE, EVIDENCE, § 747 at 97.

29. D. LOUISELL & C. MUELLER, § 445 at 629.

30. *United States v. Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978).

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In further conjunction with the requirement of accurate prior knowledge, for admission and reliance on past recollections recorded, the recollection must have been recorded when the event was fresh in the mind of the declarant. No rigid rule determines the length of time which may pass without destroying the freshness of the memory.[31] The freshness requirement, like accuracy, is affected by the specific circumstances of each case.[32] Factors which impact on freshness are gaps or qualifications which appear on the face of the statement indicating incomplete or uncertain memory.[33] Another important consideration is whether the facts described in the statement are matters of such importance in the witness' life as to survive in memory despite the passage of time.[34]

Under the above criteria, the recorded recollections in the instant case fail to provide the needed indicia of trustworthiness and fail to support the complainant's burden of proof by a preponderance of the evidence.[35] The

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31. *See, United States v. Patterson*, 678 F.2d 774, 779-780 (9th Cir.), *cert. denied*, 459 U.S. 911 (1982); *United States v. Senak*, 527 F.2d 129, 139-142 (7th Cir. 1975), *cert. denied*, 424 U.S. 907 (1976); *United States v. F.M.C. Corp.*, 306 F. Supp. at 1137; MCCORMICK ON EVIDENCE, § 301 at 866 n. 10 (lapses approved in cases vary from six weeks to three years).

32. 3 J. WIGMORE, EVIDENCE, § 747 at 96.

33. D. LOUISELL & C. MUELLER, § 445 at 639.

34. Id.

35. Complaint counsel need only to prove the subject allegations with a preponderance of evidence. *Leon Farrow, et al.*, P&S Docket No. 5893, 42 Agric. Dec. 1397, 1416 (September 21, 1983), *aff'd in part and set*

accuracy of the veterinarians' examination report and affidavits, are drawn into doubt by the incorrect exhibitor numeral which appears on the VS Form 19-7 (CX 1) and the corrected exhibitor numeral on Dr. Knowles' affidavit. (CX 2) The lapses of time between the event and the signing of the Dr. Knowles' and Dr. Riggins' affidavits, three days and fourteen days respectively (CX 2, CX 3), significantly diminish their reliability in light of the routine matter recorded and the raucous environment of the examinations. The purported facts expressed in these documents are not likely to stand out in distinction from data in similar reports. The absence of a specific entry as to date of preparation on the VS Form 19-7 and the absence of any indication that respondent's horse had been excused from the exhibition raise questions as to the freshness of information contained on it and used in the preparation of an affidavit. (Tr. 31) Although the veterinarians could supplement their affidavits by testifying as to their normal procedure in examinations and writing their reports and affidavits, they could not affirmatively assert that these methods were followed precisely in the instant case.

While the complainant's witnesses testified that they had no independent present memory of the substance of CX 1, CX 2 and CX 3, respondent's witnesses testified on the basis of present knowledge which was subject to cross-examination. Respondent's testimony, asserted to be from present memory, alleged that only one veterinarian

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aside in part, Farrow v. U.S. Dep't of Agriculture, 760 F.2d 211 (8th Cir. 1985).

examined the horse and that during the examination the veterinarian made a statement to the effect that he could find nothing wrong. (Tr. 182, 184, 201) Normal protocol requires that each of two veterinarians examine and agree on diagnoses before a complaint is initiated, since the veterinarians respect the possibility of differing subjective opinions. (Tr. 80) Dr. Knowles acknowledged that agitation in a horse, such as was displayed by respondent's animal, can affect his diagnostic opinion. The testimony that the inspection area was busy on the night of the show and the fact that the horse was not diagnosed as sore when examined by the same DQP and one of the same veterinarians on the following night are additional sources of doubts about the correctness of the recorded recollections.

A further aberration from the veterinarians' normal protocol was displayed by the duration of the examinations to which they subjected "Supreme Image." The testimony permits the conclusion that the veterinarians held the horse under surveillance for an exceptionally long time,[36] (Tr. 115, 161, 185-186) and yet the veterinarians had no recollection of this deviation from that which is normally expected. (Tr. 237)

The entire record must be considered in evaluating evidence. A careful weighing of the evidence in the instant

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36. The Act at 15 U.S.C.A. § 1823(e), requires that the inspection of horses ". . . shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable-manner."

case fails to show that complainant has carried its burden of showing by a preponderance of evidence that the horse, "Supreme Image," was sore when entered for show on August 1, 1986. Accordingly, the following order is entered.

Order

Proof of all allegations having failed, the complaint as to Sheryl Crawford is, in all aspects, dismissed.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision and Order shall become final without further procedure 35 days after service hereon unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service, as provided in section 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.142 and 1.145 (1991)).

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This Order shall take effect on the 11th (eleventh) day after this decision become final.

Copies of the Decision and Order shall be served upon respondent and counsel.

s/ Paul Kane
PAUL KANE
Administrative Law Judge

January 30, 1992

APPENDIX B — REMAND ORDER DATED OCTOBER 22, 1992.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 91-23
Cecil Jordan,	)	
Sheryl Crawford,	)	
and Ronald R. Smith,	)	
	)	
Respondents	)	**Remand Order**

This is an administrative proceeding under the Horse Protection Act of 1970 (HPA), as amended (15 U.S.C. § 1821 et seq.).

After a hearing, Administrative Law Judge Paul Kane (ALJ) filed an Initial Decision and Order on January 30, 1992, in which he found that the Complainant had failed to prove any and all allegations of the Complaint by a preponderance of the evidence. The ALJ dismissed the Complaint.

Complainant appealed on May 12, 1992, to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated.

Appendix B

For the reasons set forth below, the Initial Decision and Order is vacated, and the case is remanded to Judge Kane.

The ALJ did not regard Complainant's documentary evidence (the USDA veterinarians' examination report (VS Form 19-7) and the two veterinarians' affidavits) as probative because the ALJ concluded that the two "Government veterinarians had no present recollection of their examination of the horse at the time of their testimony at hearing, and so, CX 1, CX 2, CX 3, constitute hearsay." (Initial Decision at 9). He further concluded that the recorded recollections fail to provide the needed indicia of trustworthiness (Initial Decision at 10-15).

But, past recollection recorded is considered reliable, probative and substantial evidence, and fulfills requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if the affidavits were made while the events recorded were fresh in the witnesses' minds, as stated in *In re Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)):

> Respondents complain that complainant's evidence should be disregarded because it is "based upon past recollection recorded and not independent memory" (Appeal 1). However, respondents did not object to the admission of such evidence and, therefore, they are not in a position to complain now. Moreover, complainant's witnesses made their affidavits while the events recorded were fresh in their minds, and such

evidence is "reliable, probative, and substantial," as required by the Administrative Procedure Act (5 U.S.C. § 556(d)).

In the present case, Respondents did not object to the admission of CX 1, the form filled out by the two veterinarians stating their conclusion that the horse was sore. Moreover, the record shows conclusively that CX 1 and CX 2 were filled out while the events were fresh in the minds of the veterinarians, and CX 3 was filled out only 2 weeks after the examination, based on notes made while the events were fresh in the mind of the veterinarian. Hence the ALJ erred in failing to regard CX 1, CX 2, and CX 3 as reliable and probative.

Appendix B

For the foregoing reasons, the Initial Decision must be vacated and the case remanded to Judge Kane for the issuance of a further Initial Decision, reweighing the evidence in the light of the views set forth above.

Order

The Initial Decision filed in this proceeding is vacated and the case is remanded to the Administrative Law Judge for the purpose of filing an Initial Decision consistent with the views set forth in this Order.

Done at Washington, D.C.
October 22, 1992

s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

APPENDIX C — REVISED INITIAL DECISION AND ORDER DATED JANUARY 29, 1993.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
Cecil Jordan,	)	
Sheryl Crawford, and	)	
Ronald R. Smith,	)	
	)	
Respondents	)	HPA Docket No. 91-23

Revised
Initial Decision and Order

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, September 6, 1966, 80 Stat. 384, as amended,[1] the Rules of Practice governing proceedings under the Horse Protection Act, 9 C.F.R. § § 12.1-.10 (1992), and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1992).

The Administrator of the Animal and Plant Health Inspection Service of the Department of Agriculture, by complaint filed September 28, 1990, and amended January 25, 1991, alleges that on August 1, 1986, respondent Sheryl

1. Particular reference is made to 5 U.S.C.A. §§ 554, 557 (West 1977 and Supp. 1992). [Unofficial codifications of statutes are cited herein.]

Crawford[2] allowed a horse owned by her to be entered in a show while the horse was sore, in violation of the Horse Protection Act, Pub. L. 91-540, December 9, 1970, 84 Stat. 1404, as amended[3] (hereinafter the "Act"). The Administrator seeks the imposition of civil penalties and the disqualification of respondent from participation in the horse industry for a period of time. By answer filed February 11, 1991, Ms. Crawford, through counsel, denies the essential allegations of the complaint.

A public hearing was held on June 27, 1991, in Atlanta, Georgia, before the undersigned. Proposed findings and briefs were subsequently filed by counsel. On January 30, 1992, an Initial Decision and Order was issued dismissing the complaint with respect to respondent Sheryl Crawford. The dismissal was based on the conclusion that the documentary evidence which formed the sole evidentiary basis in support of the complaint lacked trustworthiness sufficient to sustain the complaint counsel's burden of proof by a preponderance of the evidence.

On May 12, 1992, complaint counsel appealed the Initial Decision of January 30, 1992. Thereafter, the Department's Judicial Officer issued a Remand Order on October 22, 1992, vacating the Initial Decision, which was found to be erroneous inasmuch as it failed to regard, as

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2. A decision and order as to respondent Ronald R. Smith was issued December 18, 1990. A decision and order as to respondent Cecil Jordan was issued April 17, 1991.

3. 15 U.S.C.A. § 1821, et seq (West 1982 and Supp. 1992).

reliable and probative, certain documentary evidence offered by complaint counsel. The case was remanded for reweighing of the evidence and an initial decision consistent with this view. Subsequently, upon invitation of the undersigned, counsel filed revised proposed findings, conclusions and briefs. To the extent indicated, all findings and conclusions proposed by counsel are adopted herein. All other proposed findings, conclusions and arguments are rejected as irrelevant or lacking legal or evidentiary bases. As used herein, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complaint counsel.

The interests of the Department are represented by Donald A. Tracy, Esq., Washington, D.C. The interests of respondent are represented by J. Thomas Vance, Esq., Carrollton, Georgia.

Upon consideration of all matters of record, the following Findings of Fact and Conclusions of Law are reached. As a result thereof, there is entered an order as to Sheryl Crawford, assessing a civil penalty in the sum of $2,000 and disqualifying Ms. Crawford from showing, exhibiting, or entering any horse or from otherwise participating in any horse show, exhibition, sale or auction for the period of one year.

Statutes

The following statutory provisions are applicable to this case:

Appendix C

As used in this chapter unless the context otherwise requires:

* * * * *

(3) The term "sore" when used to describe a horse means that --

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the state in which such treatment was given.[4]

* * * * *

The following conduct is prohibited:

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4. 15 U.S.C.A. § 1821(3)(D) (West 1982 and Supp. 1992).

Appendix C

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B.) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.[5]

* * * * *

(d) . . . (5) In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[6]

* * * * *

(b)(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation.[7]

* * * * *

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who . . .

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5. 15 U.S.C.A. § 1824(2) (West 1982 and Supp. 1992).

6. 15 U.S.C.A. § 1825(d)(5) (West 1982 and Supp. 1992).

7. 15 U.S.C.A. § 1825(b)(1) (West 1982 and Supp. 1992).

Appendix C

(a) . . . paid a civil penalty assessed under subsection (b) . . . for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation . . . .[8]

Findings of Fact

1. Sheryl Crawford is an individual whose mailing address is 105 Corporate Drive, Carrollton, Georgia, 30117. (Amended Complaint, Tr. 172)

2. At all times relevant herein Sheryl Crawford was the sole owner of the horse known as "Supreme Image." (Admitted, Answer, Tr. 174)

3. At all times relevant herein Cecil Jordan was the trainer of the horse known as "Supreme Image." (CX 1, CX 2, CX 3; Tr. 123)

4. The horse, "Supreme Image," was entered as Entry No. 660, Class 18, on August 1, 1986, in the Belfast Lions Club Horse Show in Belfast, Tennessee. (Amended Complaint; Answer; CX 1, CX 2, CX 3) However, "Supreme Image" was not shown. (Tr. 159, 178)

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8. 15 U.S.C.A. § 1825(c) (West 1982 and Supp. 1992).

5. Sheryl Crawford paid the entry fee for "Supreme Image" in the 1986 Belfast Lions Club Show (CX 1) and would have ridden the horse had it not been excluded from showing. (Tr. 178)

6. On August 1, 1986, "Supreme Image" was presented for inspection by its trainer, Cecil Jordan, when entered to show. (CX 1, CX 2, CX 3) The horse was examined by the Designated Qualified Person ("DQP"), Charles Thomas, and the DQP ordered the horse not to show. (CX 2, CX 3) Mr. Thomas utilized the correct numeral identifying "Supreme Image." (Tr. 216) Thereafter "Supreme Image" was examined by two Government veterinarians, Dr. Tyler Riggins and Dr. Alan Knowles. Mr. Thomas' report was not offered into evidence, although his report was available to Dr. Riggins. (Tr. 34, 55)

7. Dr. Riggins and Dr. Knowles (Tr. 22-24, 76-79), signed a report of their examination, a VS Form 19-7 (CX 1) and each signed an affidavit (CX 2, CX 3), asserting that the horse, "Supreme Image," was found to be sore. This report is never completed unless the two veterinarians concur in the observations and conclusions following upon their several subjective examinations. (Tr. 37-38, 80, 82) CX 1, contained no specific indication of the date on which it was prepared (CX 1; Tr. 68-69), contained an erroneous entry as the exhibitor numeral and was further incomplete in that the document did not reflect that the horse had been excused from the exhibition by Mr. Thomas. (CX 1;

Tr. 55, 212) Dr. Riggins prepared this document. (Tr. 33)

8. An affidavit by Dr. Riggins was executed and dated August 15, 1986, fourteen days following the show. Dr. Riggins acknowledged that information from the VS form 19-7 was used in preparation of his affidavit. (CX 3; Tr. 54) This affidavit was received into evidence over the objection of respondent's counsel. (CX 3; Tr. 30) Dr. Riggins was not able to produce any ancillary notes which might have supported the observations of facts recorded at CX 1 or CX 3. (Tr. 32, 51, 59)

9. The affidavit of Dr. Knowles was dated August 4, 1986, three days following the show and contained a corrected and initialed entry as to exhibitor numeral. (CX 2) Dr. Knowles testified that, based on the descriptions expressed in the record, it was his view that "Supreme Image" would have experienced pain on moving. (Tr. 89)

10. "Supreme Image's" trainer, Cecil Jordan, was informed after the examination that the veterinarians had diagnosed the horse to be "sore," as defined by the Act. (CX 2, CX 3)

11. The Government veterinarians who signed the examination report (CX 1) and affidavits (CX 2, CX 3) testified in 1991 that they had no, then present, recollection of their 1986 examination of the horse or

of making the report or affidavits, beyond the information contained in the documents. (Tr. 28, 32, 43, 52-53, 59, 85, 90-94)

12. The Government veterinarians who signed the report and affidavits regarding their examinations and diagnoses, testified as to their normal protocol followed in their examinations and the preparation of the VS Form 19-7 (CX 1) and affidavits. (CX 2, CX 3; Tr. 28-30, 59, 85, 92, 94) Dr. Riggins and Dr. Knowles testified that they employ techniques to distinguish a pain response to their palpation examination from the behavior of a skiddish or overly excited horse. (Tr. 26-28, 81-82)

13. No complaint pertaining to the August 1, 1986, show was filed until the autumn of 1990. (Tr. 194)

14. Respondent, Sheryl Crawford testified in 1991 on the basis of a then present recollection of the 1986 events. (Tr. 178-186)

15. Respondent testified that only one of the Government veterinarians, Dr. Riggins, physically examined the horse, "Supreme Image," on August 1, 1986. (Tr. 184, 201)

16. Respondent's husband testified that no veterinarian examined the horse prior to respondent's arrival at the examination location. (Tr. 132, 160)

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17. Respondent testified that during the examination of the horse, Dr. Riggins made a statement to the effect that he could not find anything wrong. (Tr. 182)

18. Respondent, and the horse's trainer testified that on the night of the show the horse had been confined with a mare "in season" for several hours proceeding the examination. (Tr. 124, 177-178) "Supreme Image" was a three-year old stallion on August 1, 1986. (CX 1; Tr. 179)

19. Respondent and the horse's trainer testified that on the night of the show the horse was exceptionally agitated. (Tr. 125, 129, 178-179, 185)

20. Dr. Riggins report of his observations of "Supreme Image" (CX 1) confirmed at Item 29 respondent's testimony concerning the horse's agitation. (Tr. 35, 40, 56) Dr. Riggins admitted that a horse's environment and excitement could affect its conditions at examination, but that such would not influence the results of palpation. (Tr. 51)

21. Dr. Knowles admitted that if a horse is agitated that fact can affect his diagnostic opinion (Tr. 98), and, he stated that generally an agitated animal would be less responsive to palpation. (Tr. 108)

22. Dr. Knowles, whose memory of the events of August 1, 1986, but not his examination of "Supreme Image," was refreshed by his reading on the witness stand of

CX 1 and CX 2 (Tr. 85), described the show as a night affair, that he was busy with other inspections and did not observe the examinations of "Supreme Image" by either Mr. Thomas or Dr. Riggins. (Tr. 86)

23. Respondent and respondent's witnesses tested that the period during which the veterinarians were examining the horse lasted from one to two hours. (Tr. 115, 161, 185-186)

24. Dr. Riggins acknowledged that one and one half hours would not be a reasonable length of time for an examination. (Tr. 62)

25. Respondent instructed her employee who trained "Supreme Image" not to allow any harm, including soring, to her horse. (Tr. 123, 176)

26. The horse was shown at an exhibition in Wartrace, Tennessee, on August 2, 1986, the night following that on which the subject conduct was alleged to have occurred. Inspection by the same DQP, Charles Thomas, and by one of the Government's witnesses, Dr. Knowles failed to result in a diagnosis of "sore" at that time. (Tr. 188-189)

27. Respondent exhibited her horse on August 1, 1986, as a recreational activity. (Tr. 174) Although Ms. Crawford owns other horses in addition to "Supreme Image," (Tr. 172-175) her source of income is unrelated to the horse industry. (Tr. 173) Any sanction

imposed as a result of these proceeding would imperil a license from the State of Georgia necessary to the pursuit of her insurance underwriting business. (Tr. 190-191) No other allegation as to any violation of the Act has never been advanced against Ms. Crawford. (Tr. 215) Ms. Crawford fully cooperated with the Department's veterinarians and investigators in the performance of their official duties. (Tr. 185, 193, 205, 233)

Conclusions

Based upon an evaluation of all evidence, consideration of the policy set forth in the Judicial Officer's Remand Order in this case, which is binding on an administrative law judge, *All-Airtransport, Inc.*, 50 Agric. Dec. 420, 421 (A.Q. Dkt. No. 89-75) (April 17, 1991), the entry of findings above and the application of appropriate law, it is determined that Sheryl Crawford was the sole owner of "Supreme Image" and allowed the entry of that horse, while sore, a legal conclusion, in the Belfast Lions Club Horse Show at Belfast, Tennessee, on August 1, 1986.

Discussion

The Act was intended to reduce the incidents of cruelty of animals, thereby enhancing the integrity of the horse breeding and showing industries. *Thornton v. U.S. Dep't of Agriculture*, 715 F.2d 1508 Pith Cir. 1983). In

1987, the United States Court of Appeals for the District of Columbia Circuit[9] demanded stricter compliance with the intent of Congress that soring be stopped under the Horse Protection Act:

> The Act was clearly designed to end soring. It explicitly finds soring is "cruel and inhumane," flatly prohibits the showing in a horse show of "any horse which is sore," and makes it criminal offense knowingly to do so. Moreover, Congress amended the Act in 1976 "to stop an inhumane and harmful practice that the Congress thought would end when it enacted [the original Act], but which has not in fact ended."

American Horse Protection Ass'n Inc. v. Lyng, 812 F.2d 1, 6 (D.C. Cir. 1987), *on remand*, 681 F. Supp. 949 (D.D.C. 1988) (Internal citations omitted).

The evidentiary basis supporting this complaint is contained in the examination report, VS Form 19-7 (CX 1) and affidavits executed by the Government veterinarians. (CX 2, CX 3)[10] The veterinarians had no present

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9. Alternative jurisdiction exists in this Circuit upon petitions for review of Department of Agriculture orders. (28 U.S.C.A. §§ 2342-2344) (West 1978 and Supp. 1992)

10. CX 4 was admitted into the record solely for the impeachment of the testimony of the witness, Cecil Jordan. (Tr. 148-149) Since this document was received only for a specific limited purpose, the contents of this statement do not constitute substantive evidence in spite of the reference in complaint counsel's original brief suggesting the contrary. (Brief for Complainant at 10) *See, 3A J. WIGMORE, EVIDENCE*, § 1018, 997-998 (Chadborn rev. 1970 & Supp. 1982) (proclaiming

recollection of their examinations of the horse at the time of their testimony at hearing, and so, CX 1, CX 2, CX 3, constitute hearsay. They were admitted in this proceeding under the Rules of Practice, 7 C.F.R. § 1.141 which does not exclude probative hearsay, meeting the requirements of fundamental fairness.[11] Similar records are often admitted at trial under the past recollection recorded exception to the hearsay rule. Fed. R. Evid. 803(5)[12] The touchstone for

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"orthodox view," widely, though not universally followed, to be that prior self-contradictions are not to be treated as having any substantive or independent testimonial value) (emphasis in original); *United States v. Day*, 789 F.2d 1217 (6th Cir. 1986) (finding that proponent of prior inconsistent statement pursuant to FED. R. EVID. 801(d)(1)(A) – the hearsay exception allowing admission of prior inconsistent statements made under oath, subject to penalty of perjury, at trial, hearing, or other proceeding, or in a deposition – has affirmative burden of showing that individual administering oath had authority to invoke penalty of perjury).

11. *See, Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir 1974) *cert. denied*, 419 U.S. 1113, *reh'g denied*, 420 U.S. 984 (1975) (stating that the test for admission of hearsay in administrative proceedings are fundamental fairness and probativeness).

12. Rule 803(5) of the Federal Rules of Evidence provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * *
>
> (5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party

admission of evidence as an exception to the hearsay rule has been the existence of circumstances which attest to its trustworthiness.[13]

Under the Federal Rules of Evidence statements constituting past recollection recorded must accurately reflect the prior first hand knowledge of the witness,[14] and must have been recorded when the event was fresh in the mind of the declarant. Accuracy and freshness, which are equally important factors in the consideration of such evidence in this proceeding, are determined from the circumstances of each case.[15] While no rigid rule determines the length of time which may pass without

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Even though the Department of Agriculture has declined to follow the federal rules in its administrative proceedings, *James W Hickey, et al.*, AWA Docket No. 369, 47 Agric. Dec. 840, 850 (May 27, 1988) ("Hickey I"), the rationale of the Federal Rules of Civil Procedure has been adopted to support the results reached in administrative adjudications. *Miguel A. Machado, et al.*, P&S Docket No. 5943, 42 Agric. Dec. 820, 846 (June 28, 1983) *aff'd, Cozzi v. U.S. Dep't of Agriculture*, 749 F.2d 36 (9th Cir. 1984) ". . . [c]ourts have consistently held that agencies need not observe all the rules and formalities applicable to court room proceedings." *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1985).

13. *United States v. Williams*, 571 F.2d 344, 350 (6th Cir. 1978) *cert. denied*, 439 U.S. 841 (1978); *United States v. F.M.C. Corp.*, 306 F. Supp. 1106, 1138 (E.D. Pa. 1969).

14. *United States v. Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978), *later app.* 581 F.2d 553 (5th Cir. 1978).

15. *United States v. Williams*, 571 F.2d at 350; 3 J. WIGMORE, EVIDENCE, § 747 at 96 (Chadborn rev. 1970 & Supp. 1982).

destroying the freshness of the memory,[16] factors which impact on freshness are, gaps or qualifications, which appear on the face of the statement indicating incomplete or uncertain memory.[17] An important consideration is whether the facts described in the statement are matters of such importance in the witness' life as to survive in memory despite the passage of time.[18]

In view of the error and omissions in the examination report (CX 1), the corrected entry in Dr. Knowles' affidavit (CX 2), and the delay in preparation of Dr. Riggins' affidavit (CX 3), complainant's evidence was found in the original Initial Decision to lack sufficient indicia of trustworthiness to support a conclusion that Ms. Crawford violated the Act. On appeal, the Judicial Officer has decided that the Government's documents shall be regarded as probative and reliable evidence, inasmuch as ". . . past recollection recorded is considered reliable, probative and substantial evidence, and fulfills requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if the affidavits were made while the events recorded were fresh in the witnesses' minds. . . ." *Cecil Jordan, et al.*, (H.P.A.

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16. *See, United States v. Patterson*, 678 F.2d 774, 779-780 (9th Cir. 1982), *cert. denied*, 459 U.S. 911 (1982); *United States v. Senak* 527 F.2d 129, 139-142 (7th Cir. 1975), *cert. denied*, 424 U.S. 907 (1976); *United States v. F.M.C. Corp.*, 306 F. Supp. at 1137; MCCORMICK ON EVIDENCE at 866 n. 10 (1984 & Supp. 1987) (lapses approved in cases vary from six weeks to three years).

17. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 445 at 639 (1980 & Supp. 1991).

18. *Id.*

Dkt. No. 91-23) (Remand Order, slip op. at 2) (October 22, 1992) (citing *Rowland*, 40 Agric. Dec. 1934, 1942 (H.P.A. Dkt. No. 107) (December 9, 1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

The examination report and affidavits reveal that after the horse was turned down by the DQP, Dr. Riggins and Dr. Knowles examined "Supreme Image" and found that the horse exhibited abnormal bilateral sensitivity. Dr. Knowles recorded his opinion that the pain exhibited by the horse was caused by means prohibited by the Act. He testified at hearing that, based on the descriptions in the record, it was his view that "Supreme Image" would have experienced pain on moving; The documents assert that Cecil Jordan, trainer of "Supreme Image," presented the horse for inspection and was informed that the veterinarians found the horse to be "sore" as defined by the Act.

When regarded as reliable and probative, complainant's documentary evidence asserting that "Supreme Image" exhibited bilateral pain in its forelegs, is sufficient to raise the rebuttable presumption that the horse was "sore," as provided in the Act, 15 U.S.C. § 1825(d)(5). Respondent has not rebutted this statutory presumption. Respondent's only explanation for the sensitivity exhibited by her stallion, is that "Supreme Image" was exceptionally agitated at the time of the examination because of being confined with a mare "in season." While this fact was confirmed by the Government veterinarians, and Dr. Riggins acknowledges that agitation would have affected "Supreme Image's" condition and Dr. Knowles acknowledged that his

diagnostic opinion could be generally affected by a horse's agitated condition, Dr. Riggins stated that agitation would not influence the results of palpation and both veterinarians testified that they employ techniques to distinguish a pain response to their palpation examination from the behavior of a skiddish or excited horse.

Respondent's defense focused primarily on disputing that the examination report and affidavits accurately reflected the examination of "Supreme Image" on the date at issue. The testimony of respondent and her husband, Mr. Doug Crawford, advanced the averment that only one veterinarian, Dr. Riggins, physically examined "Supreme Image." Respondent and Mr. Crawford claimed that from the time of the DQP's examination until the horse was removed from the examination area, one or both of them were present to witness the events involving "Supreme Image." Mr. Crawford testified that he accompanied Cecil Jordan, the horse's trainer to the inspection area and that he saw no veterinarian examine "Supreme Image" between the DQP's examination and the time, about a minute later, that respondent arrived in the area.[19] Respondent stated that from the time she arrived and took the horse from Mr.

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19. Cecil Jordan, trainer of "Supreme Image," also testified on behalf of respondent, to deny that the USDA veterinarians examined "Supreme Image" while the horse was in Jordan's custody, from the time of the DQP exam until respondent arrived in the inspection area. Mr. Jordan also testified that the Government veterinarians informed him that they found the horse to be sore as defined by the Act, when he returned to the inspection area as respondent was leaving with "Supreme Image." However, Mr. Jordan's testimony concerning these events was impeached at hearing by his prior sworn statement that he was "with the horse when the USDA veterinarians examined him." (CX 4 at 2)

Jordan, until she and "Supreme Image" left the inspection area, only one veterinarian, Dr. Riggins, physically examined the horse. Respondent also testified that Dr. Riggins made a statement during his examination to the effect that he could not find anything wrong with the horse. It was the contention of respondent and respondent's witnesses that the period during which the veterinarian was examining the horse lasted from one to two hours.

After careful consideration of the conflicting evidence in this case, it is necessary to find that when complainant's documentary evidence is viewed as reliable and probative, the clinical findings attributed to the two qualified and experienced Government veterinarians, merit greater credibility and weight than the testimony of respondent and her husband. CX 1, CX 2 and CX 3 are sufficiently detailed to provide substantial evidence on which to base a decision. Under Departmental precedent, palpation by Government veterinarians, without other evidence, is sufficient to support a finding that a horse is sore. *Pat Sparkman, et al.*, 50 Agric. Dec. 602, 612-613 (H.P.A. Dkt. No. 88-58) (January 24, 1991). Accordingly, it is determined that the requisite level of proof supports the conclusion that "Supreme Image" was sore when entered in the Belfast Lions Club Horse Show on August 1, 1986.[20]

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20. Complaint counsel need only to prove the subject allegations with a preponderance of evidence. *Leon Farrow, et al.*, 42 Agric. Dec. 1397, 1416 (P&S Dkt. No. 5893) (September 21, 1983), *aff'd in part and set aside in part, Farrow v. U.S. Dep't of Agriculture*, 760 F.2d 211 (8th Cir. 1985).

Appendix C

Sanction

Respondent, Sheryl Crawford, having been found to be the owner of a horse which was sore when entered in the Belfast Horse Show, in August, 1986, is subject to the penalties required under the Act. *See Pat Sparkman, et al.*, 50 Agric. Dec. 610 (H.P.A. Dkt. No. 88-58) (January 24, 1991). Complainant recommends a civil penalty of $2,000, the maximum amount permitted under the Act and disqualification from industry participation for a period of one year. According to Departmental policy, sanctions in each case will be determined by examining the nature of the violation in relation to the remedial purposes of the regulatory statute, along with all relevant circumstances, giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose. *S.S. Farms Linn County, Inc., et al.* (A W.A. Dkt. No. 89-03) (February 8, 1991), *appeal docketed* No. 91-10169 (9th Cir. 1992).

The operative statute[21] provides:

Civil penalties; review and enforcement

(b)(l) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such

21. 15 U.S.C.A. § 1825(b)(1)(2) (West 1982 and Supp. 1992).

person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of Title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

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The statute[22] also provides:

> (c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil

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22. 15 U.S.C.A. § 1825(c) (West 1982 and Supp. 1992).

penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

The statute is specific. It requires that identified classes of facts be examined prior to the imposition of civil penalties upon findings of a violation. These classes of facts, which are relevant to the determination of the amount of the civil penalty to be assessed are:

1. The nature of the prohibited conduct
2. The circumstances of the prohibited conduct
3. The extent of the prohibited conduct
4. The gravity of the prohibited conduct
5. The degree of culpability of the perpetrator
6. The history of prior offenses by the perpetrator
7. The ability of the perpetrator to pay a civil penalty
8. The effect of the dollar amount of a civil penalty on the perpetrator's ability to continue to do business
9. Any such other matters as justice may require

As discussed at length in the Initial Decision and Order issued by the undersigned in *Glen 0. Crowe and Leslie Crowe*, Agric. Dec._____ (HPA Dkt. No. 91-49) (June 3, 1992), the imposition of civil penalties must be

supported by factual record evidence. The Administrative Procedure Act specifies in part.[23]

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof; Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . .

The Department's Judicial Officer has determined that "it is the responsibility of respondents to come forward with some evidence indicating an inability to pay, or an inability to continue to do business." *A.P. "Sonny" Holt, et al.*, 49 Agric. Dec. 853, 865 (H.P.A. Dkt. No. 88-28) (July 11, 1990). Thus, it is the duty of respondent to provide proof as to items numbered 7 and 8 above, and the duty of complaint counsel to provide proof as to the remaining numbered items. In this case the facts as they relate to the stated statutory factors are as follows:

1. The nature of the prohibited conduct. Sheryl Crawford allowed the entry of "Supreme Image," a sore horse, at

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23 . 5 U.S.C.A. § 556(d) (West 1977 and Supp. 1992).

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the Belfast Lions Club Horse Show at Belfast, Tennessee, on August 1, 1986.

2. The circumstances of the prohibited conduct. Respondent was the owner of "Supreme Image." She paid the horse's entry fee for the show and would have ridden "Supreme Image" if it had not been excluded from the show. The evidence indicates that the actual training of the horse was conducted by an employee of Mrs. Crawford, Mr. Cecil Jordan.

3. The extent of the prohibited conduct. This case involved only one horse owned by Sheryl Crawford and found to be sore.

4. The gravity of the prohibited conduct. The reported examinations by the Government veterinarians shows "strong" and "extreme" response to palpation. (CX 1, CX 2, CX 3)

5. The degree of culpability of the perpetrator. While respondent did not personally train the horse, it was trained by one of her employees. The evidence indicates that respondent instructed the trainer not to permit any harm, including soring, to her horse.

6. The history of prior offenses by the perpetrator. No other allegation as to any violation of the Act has ever been advanced against Ms. Crawford.

7. The ability of the perpetrator to pay a civil penalty. As previously noted, the respondent has the obligation to provide this information. Ms. Crawford has made no statement concerning her ability to pay a civil penalty. However, the record indicates that respondent owns

several horses including "Supreme Image." Consequently I must conclude that she is able to pay the authorized penalty.[24]

8. The effect of the dollar amount of a civil penalty on the perpetrator's ability to continue to do business. Consideration of ability to continue in business is not relevant to the determination of the amount of civil penalty in this case, inasmuch as it has been found that respondent entered the horse to show as an amateur and her source of income is unrelated to the horse industry. Respondent's concern that being found in violation of the Act will have a negative affection her insurance business and imperil her license is not relevant to this determination of the amount of civil penalty.

9. Ms. Crawford, cooperated fully with the Department's veterinarians and investigators in the performance of their official duties.

After careful evaluation of all relevant facts as prescribed by the Act, it is determined that although this is respondent's first offense, ". . . soring is so detrimental to the walking horse industry, and involves such an inhumane practice, that a $2,000 civil penalty is appropriate for the first offense." *A.P. "Sonny" Holt, et al.*, 49 Agric. Dec. at 865 (H.P.A. Dkt. No. 88-28j (July 11, 1990).

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24. *A.P. "Sonny" Holt, et al.*, 49 Agric. Dec. 853, 872 (H.P.A. Dkt. No. 88-28) (July 11, 1990) reveals an institutional inference that ownership of one Tennessee Walking Horse establishes an ability to pay maximum civil penalty.

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The Act also provides that anyone assessed a civil penalty under the Act may be disqualified from industry participation for a period of not less than one-year for a first violation. The Judicial Officer has explained that the disqualification provisions are a "strong deterrent to subsequent offenses by individuals who have the economic means to pay civil penalties as a cost of doing business." Consequently, it has been determined that "the minimum disqualification provisions should be utilized in every Horse Protection Act case." *Eldon Stamper*, 42 Agric. Dec. 20, 60, 61 (H.P.A. Dkt. No. 168) (January 11, 1983). One year is the normal period of disqualification for first time offenders. *Larry E. Edwards, et al.*, 49 Agric. Dec. 188, 206 (H.P.A. Dkt. No. 88-2) (June 29, 1990) *aff'd*, 943 F.2d 1318 (11th Cir. 1991) *reh'g denied* 946 F.2d 1549, *cert. denied*, 112 S. Ct. 1475). Accordingly, it is determined that one year disqualification is appropriate in this case, to deter future violations by respondent and others.

Order

1. Sheryl Crawford is assess a civil penalty of $2,000.
2. Sheryl Crawford is disqualified for one year from showing, exhibiting, or entering any-horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, or horse exhibition, or horse sale or auction.

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Pursuant to the Rules of Practice governing proceeding under the Act, this Decision and Order shall become final without further procedure thirty-five days after service hereon unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service, as provided in §§ 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.142 and 1.145).

This order shall take effect on the eleventh day after this Decision becomes final.

Copies of this Decision and Order shall be served upon respondent and counsel.

/s "Original Signed By Paul Kane"
PAUL KANE
Administrative Law Judge

January 29, 1993

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APPENDIX D — DECISION AND ORDER DATED NOVEMBER 19, 1993.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket NO. 91-23
Cecil Jordan,	)	
Sheryl Crawford,	)	
and Ronald R. Smith,	)	
	)	**Decision and Order**
Respondents	)	**as to Sheryl Crawford**

This is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 *et seq.*). On January 29, 1993, Administrative Law Judge Paul Kane (ALJ) filed a Revised Initial Decision and Order in which he found that Respondent Sheryl Crawford allowed the entry, for the purpose of showing or exhibiting, a horse at a horse show while the horse was sore. The ALJ assessed a civil penalty of $2,000, and disqualified Respondent for 1 year from showing, exhibiting. or entering any horse, and from judging, managing, or otherwise participating in any horse show.

On April 29, 1993, Respondent Sheryl Crawford appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7

C.F.R. § 2.35).* On August 17, 1993, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Revised Initial Decision and Order is adopted as the final Decision and Order, with additions shown by brackets, deletions shown by dots, and with trivial editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This decision is promulgated pursuant to the Administrative Procedure Act, Pub. L. 89-554, September 6, 1966, 80 Stat. 384, as amended,[1] the Rules of Practice governing proceedings under the Horse Protection Act, 9 C.F.R. §§ 12.1-.10 (1992), and the Rules of Practice of the Department of Agriculture Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. §§ 1.130-.151 (1992).

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* The position of Judicial Officer was established pursuant to the Act of April 4,1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

1. Particular reference is made to 5 U.S.C.A. §§ 554, 557 (West 1977 and Supp. 1992). [Unofficial codifications of statutes are cited herein.] [Brackets by the ALJ.]

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The Administrator of the Animal and Plant Health Inspection Service of the Department of Agriculture, by complaint filed September 28, 1990, and amended January 25, 1991, alleges that on August 1, 1986, respondent Sheryl Crawford[2] allowed a horse owned by her to be entered in a show while the horse was sore, in violation of the Horse Protection Act, Pub. L. 91-540, December 9, 1970, 84 Stat. 1404, as amended[3] (hereinafter the "Act"). The Administrator seeks the imposition of civil penalties and the disqualification of respondent from participation in the horse industry for a period of time. By answer filed February 11, 1991, Ms. Crawford, through counsel, denies the essential allegations of the complaint.

A public hearing was held on June 27, 1991, in Atlanta, Georgia, before the undersigned. Proposed findings and briefs were subsequently filed by counsel. On January 30, 1992, an Initial Decision and Order was issued dismissing the complaint with respect to respondent Sheryl Crawford. The dismissal was based on the conclusion that the documentary evidence, which formed the sole evidentiary basis in support of the complaint, lacked trustworthiness sufficient to sustain the complaint counsel's burden of proof by a preponderance of the evidence.

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2. A [consent] decision and order as to respondent Ronald R. Smith was issued December 18, 1990. A [consent] decision and order as to respondent Cecil Jordan was issued April 17, 1991.

3. 15 U.S.C.A. § 1821 *et seq.* (West 1982 and Supp. 1992).

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On May 12, 1992, complaint counsel appealed the Initial Decision of January 30, 1992. Thereafter, the Department's Judicial Officer issued a Remand Order on October 22, 1992, vacating the Initial Decision, which was found to be erroneous inasmuch as it failed to regard, as reliable and probative, certain documentary evidence offered by complaint counsel. The case was remanded for reweighing of the evidence and an initial decision consistent with this view. Subsequently, upon invitation of the undersigned, counsel filed revised proposed findings, conclusions and briefs. To the extent indicated, all findings and conclusions proposed by counsel are adopted herein. All other proposed findings, conclusions and arguments are rejected as irrelevant or lacking legal or evidentiary bases. As used herein, "Tr." refers to the transcript of the public hearing. "CX" refers to the numbered exhibits offered by complaint counsel.

The interests of the Department are represented by Donald A. Tracy, Esq., Washington, D.C. The interests of respondent are represented by J. Thomas Vance, Esq., Carrollton, Georgia.

Upon consideration of all matters of record, the following Findings of Fact and Conclusions of Law are reached. As a result thereof, there is entered an order as to Sheryl Crawford, assessing a civil penalty in the sum of $2,000 and disqualifying Ms. Crawford from showing, exhibiting, or entering any horse or from otherwise participating in any horse show, exhibition, sale or auction for the period of one year.

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Statutes

The following statutory provisions are applicable to this case:

As used in this chapter unless the context otherwise requires:

* * * * *

(3) The term "sore" when used to describe a horse means that--

* * * * *

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.[4]

The following conduct is prohibited:

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4. 15 U.S.C.A. § 1821(3)(D) (West 1982 and Supp. 1992).

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(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.[5]

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(d)(5)In any civil or criminal action to enforce this [chapter] or any regulation under this [chapter] a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[6]

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(b)(l) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation....[7]

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(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who . . . (a) . . . paid a civil penalty assessed under subsection (b) . . . [or is subject to a final order under such subsection assessing a civil penalty] for

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5. 15 U.S.C.A. § 1824(2) (West 1982 and Supp. 1992).

6. 15 U.S.C.A. § 1825(d)(5) (West 1982 and Supp. 1992).

7. 15 U.S.C.A. § 1825(b)(1) (West 1982 and Supp. 1992).

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any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation ....[8]

Findings of Fact

1. Sheryl Crawford is an individual whose mailing address is 105 Corporate Drive, Carrollton, Georgia 30117. (Amended Complaint, Tr. 172)

2. At all times relevant herein Sheryl Crawford was the sole owner of the horse known as "Supreme Image." (Admitted, Answer, Tr. 174)

3. At all times relevant herein Cecil Jordan was the trainer of the horse known as "Supreme Image." (CX 1, CX 2, CX 3; Tr. 123)

4. The horse, "Supreme Image," was entered as Entry No. 660, Class 18, on August 1, 1986, in the Belfast Lions Club Horse Show in Belfast, Tennessee. (Amended Complaint; Answer; CX 1, CX 2, CX 3) However, "Supreme Image" was not shown (Tr. 159, 178)

5. Sheryl Crawford paid the entry fee for "Supreme Image" in the 1986 Belfast Lions Club Show (CX 1) and would have ridden the horse had it not been excluded from showing. (Tr. 178)

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8. 15 U.S.C.A. § 1825(c) (West 1982 and Supp. 1992).

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6. On August 1, 1986, "Supreme Image" was presented for inspection by its trainer, Cecil Jordan, when entered to show. (CX 1, CX 2, CX 3) The horse was examined by the Designated Qualified Person ("DQP"), Charles Thomas, and the DQP ordered the horse not to show. (CX 2, CX 3) Mr. Thomas utilized the correct numeral identifying "Supreme Image." (Tr. 216) Thereafter "Supreme Image" was examined by two Government veterinarians, Dr. Tyler Riggins and Dr. Alan Knowles. Mr. Thomas' report was not offered into evidence, although his report was available to Dr. Riggins. (Tr. 34, 55)

7. Dr. Riggins and Dr. Knowles, (Tr. 22-24, 76-79), signed a report of their examination, a VS Form 19-7 (CX 1), and each signed an affidavit (CX 2, CX 3) asserting that the horse, "Supreme Image," was found to be sore. This report is never completed unless the two veterinarians concur in the observations and conclusions following upon their several subjective examinations. (Tr. 37-38, 80, 82) CX 1 contained no specific indication of the date on which it was prepared (CX 1; Tr. 68-69) [, other than the date "8/1/86" and the time "10:00 PM" appearing in item 4, and Dr. Riggins testified that the document is always prepared the same night of the show, just as soon as possible after the examination (Tr. 68-70),] contained an erroneous entry as the exhibitor numeral [, i.e., "360" rather than "660," although Dr. Riggins' affidavit showed the correct number "660" (CX 3) and Dr. Knowles initialed the corrected number "660" on his affidavit (CX 2),] and was further incomplete in that the

document did not reflect that the horse had been excused from the exhibition by Mr. Thomas (CX 1; Tr. 55, 212) [, but the affidavits of both veterinarians state that the horse was excused by Mr. Thomas (CX 2, 3). In addition, CX 1 accurately states the horse's name, color, age, sex, owner, trainer and class.] Dr. Riggins prepared this document [, i.e., CX 1]. (Tr. 33) [Dr. Knowles testified that under his routine practice, his affidavit would have been prepared on Saturday morning, the day after the show, and signed under oath on Monday morning, when he went to his office (Tr. 91-93).]

8. An affidavit by Dr. Riggins was executed and dated August 15, 1986, fourteen days following the show. Dr. Riggins acknowledged that information from the VS Form 19-7 was used in preparation of his affidavit. (CX 3; Tr. [29-32, 52,] 54) This affidavit was received into evidence over the objection of respondent's counsel. (CX 3; Tr. 30) Dr. Riggins was not able to produce any ancillary notes which might have supported the observations of facts recorded at CX 1 or CX 3. (Tr. 32, 51, 59)

9. The affidavit of Dr. Knowles was dated August 4, 1986, three days following the show and contained a corrected and initialed entry as to exhibitor numeral. (CX 2) [The correction to the exhibitor numeral could not have been made after Monday, August 4, 1986, because the affidavit was no longer in his possession after that date (Tr. 99-93).] Dr. Knowles testified that, based on the descriptions expressed in the record, it

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was his view that "Supreme Image" would have experienced pain on moving. (Tr. 89) [It was Dr. Knowles' professional opinion that the pain was caused by chemicals and/or chains or other action devices (Tr. 87-88).]

10. "Supreme Image's" trainer, Cecil Jordan, was informed after the examination that the veterinarians had diagnosed the horse to be "sore," as defined b the Act. (CX 2, CX 3)

11. The Government veterinarians who signed the examination report (CX 1) and affidavits (CX 2, CX 3) testified in 1991 that they had no, then present, recollection of their 1986 examination of the horse or of making the report or affidavits, beyond the information contained in the documents. (Tr. 28, 32, 43, 52-53, 59, 85, 90-94)

12. The Government veterinarians who signed the report and affidavits regarding their examinations and diagnoses, testified as to their normal protocol followed in their examinations and the preparation of the VS Form 19-7 (CX 1) and affidavits. (CX 2. CX 3; Tr. 28-30, 59, 85, 92, 94) Dr. Riggins and Dr. Knowles testified that they employ techniques to distinguish a pain response to their palpation examination from the behavior of a skiddish or overly excited horse. (Tr. 26-28, [51,] 81-82 [, 102, 108])

13. No complaint pertaining to the August 1, 1986, show was filed until the autumn of 1990. (Tr. 194)

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14. Respondent Sheryl Crawford testified in 1991 on the basis of a then present recollection of the 1986 events. (Tr. 178-186)

15. Respondent testified that only one of the Government veterinarians, Dr. Riggins, physically examined the horse, "Supreme Image," on August 1, 1986. (Tr. 184, 201)

16. Respondent's husband testified that no veterinarian examined the horse prior to respondent's arrival at the examination location. (Tr. 132, 160)

17. Respondent testified that during the examination of the horse, Dr. Riggins made a statement to the effect that he could not find anything wrong. (Tr. 182)

18. Respondent and the horse's trainer testified that on the night of the show the horse had been confined with a mare "in season" for several hours [preceding] the examination. (Tr. 124, 177-178) "Supreme Image" was a three-year old stallion on August 1, 1986. (CX 1; Tr. 179)

19. Respondent and the horse's trainer testified that on the night of the show the horse was exceptionally agitated. (Tr. 125, 129, 178-179, 185)

20. Dr. Riggins' report of his observations of "Supreme Image" (CX 1) confirmed at Item 29 respondent's testimony concerning the horse's agitation. (Tr. 35. 40, 56) Dr. Riggins admitted that a horse's environment and excitement could affect its conditions at examination, but that such would not influence the results of palpation. (Tr. 51)

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21. Dr. Knowles admitted that if a horse is agitated that fact can affect his diagnostic opinion (Tr. 98), and, he stated that generally an agitated animal would be less responsive to palpation. (Tr. 108)

22. Dr. Knowles, whose memory of the events of August 1, 1986, but not his examination of "Supreme Image," was refreshed by his reading on the witness stand of CX 1 and CX 2 (Tr. 85), described the show as a night affair, that he was busy with other inspections and did not observe the examinations of "Supreme Image" by either Mr. Thomas or Dr. Riggins. (Tr. 86)

23. Respondent and respondent's witnesses testified that the period during which the veterinarians were examining the horse lasted from one to two hours. (Tr. 115, 161, 185-186)

24. Dr. Riggins acknowledged that one and one half hours would not be a reasonable length of time for an examination. (Tr. 62)

25. Respondent instructed her employee who trained "Supreme Image" not to allow any harm, including soring, to her horse. (Tr. 123, 176)

26. The horse was shown at an exhibition in Wartrace, Tennessee, on August 2, 1986, the night following that on which the subject conduct was alleged to have occurred. Inspection bar the same DQP, Charles Thomas, and by one of the Government's witnesses, Dr. Knowles, failed to result in a diagnosis of "sore" at that time. (Tr. 188-189)

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27. Respondent exhibited her horse on August 1, 1986, as a recreational activity. (Tr. 174) Although Ms. Crawford owns other horses in addition to "Supreme Image" (Tr. 172-175), her source of income is unrelated to the horse industry. (Tr. 173) [Respondent testified that] any sanction imposed as a result of this proceeding would imperil a license from the State of Georgia necessary to the pursuit of her insurance underwriting business [although there is no rational basis for any State action affecting her insurance license because of this proceeding]. (Tr. 190-191) No other allegation as to any violation of the Act has [ever] been advanced against Ms. Crawford. (Tr. 215) Ms. Crawford fully cooperated with the Department's veterinarians and investigators in the performance of their official duties. (Tr. 185, 193, 205, 233)

Conclusions

Based upon an evaluation of all evidence, consideration of the policy set forth in the Judicial Officer's Remand Order in this case, which is binding on an administrative law judge, *All-Airtransport, Inc.* 50 Agric. Dec. 420, 421 (A.Q. Dkt. No. 89-75) (April 17, 1991), the entry of findings above and the application of appropriate law, it is determined that Sheryl Crawford was the sole owner of "Supreme Image" and allowed the entry of that horse, while sore, a legal conclusion, in the Belfast Lions Club Horse Show at Belfast, Tennessee, on August 1, 1986.

Discussion

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The Act was intended to reduce the incidents of cruelty of animals, thereby enhancing the integrity of the horse breeding and showing industries. *Thornton v. U.S. Dep't of Agriculture*, 715 F.2d 1508 (11th Cir. 1983). In 1987, the United States Court of Appeals for the District of Columbia Circuit[9] demanded stricter compliance with the intent of Congress that soring be stopped under the Horse Protection Act:

> The Act was clearly designed to end soring. It explicitly finds soring is "cruel and inhumane," flatly prohibits the showing in a horse show of "any horse which is sore," and makes it criminal offense knowingly to do so. Moreover, Congress amended the Act in 1976 "to stop an inhumane and harmful practice that the Congress thought would end when it enacted [the original Act], but which has not in fact ended."

American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 6[-7] (D.C. Cir. 1987), *on remand*, 681 F. Supp. 949 (D.D.C. 1988) (Internal citations omitted)

The evidentiary basis supporting this complaint is contained in the examination report, VS Form 19-7 (CX 1) and affidavits executed by the Government veterinarians. (CX 2, CX 3)[10] The veterinarians had no present

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9. Alternative jurisdiction exists in this Circuit upon petitions for review of Department of Agriculture orders. [(15 U.S.C. § 1825(b)(2)]

10. CX 4 [,which is an affidavit by Cecil Jordan dated September 2, 1986, in which he states at page 2, "On August 1st, Friday night, I was with

recollection of their examinations of the horse at the time of their testimony at hearing, and so, CX 1, CX 2, [and] CX 3 constitute hearsay. They were admitted in this proceeding under the Rules of Practice, 7 C.F.R. § 1.141, which does not exclude probative hearsay, meeting the requirements of fundamental fairness.[11] Similar records are often admitted at trial [in court proceedings] under the past recollection recorded exception to the hearsay rule. FED. R. EVID. 803(5)[12] The touchstone for admission of evidence as an exception to the hearsay rule [in court proceedings] has

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the horse when the USDA veterinarians examined him. He flinched on one (1) foot a little, he led fine and rode sound,"] was admitted into the record solely for the impeachment of the testimony of the witness, Cecil Jordan. (Tr. 148-49)....

11. *See Martin Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974) *cert. denied*, 419 U.S. 1113, *reh'g denied*, 420 U.S. 984 (1975) (stating that the test[s] for admission of hearsay in administrative proceedings are fundamental fairness and probativeness).

12. Rule 802 of the Federal Rules of Evidence provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> *****
>
> (5) **Recorded Recollection**. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by and adverse party.

been the existence of circumstances which attest to its trustworthiness.[13]

. . . . [Footnotes 14 through 18 omitted.][14 15 16 17 18]

The examination report and affidavits reveal that after the horse was turned down by the DQP, Dr. Riggins and Dr. Knowles examined "Supreme Image" and found that the horse exhibited abnormal bilateral sensitivity. Dr. Knowles recorded his opinion that the pain exhibited by the horse was caused by means prohibited by the Act. He testified at hearing that, based on the descriptions in the record, it was his view that "Supreme Image" would have experienced pain on moving. The documents assert that Cecil Jordan, trainer of "Supreme Image," presented the horse for inspection and was informed that the veterinarians found the horse to be "sore" as defined by the Act.

When regarded as reliable and probative, complainant's documentary evidence asserting that "Supreme Image" exhibited bilateral pain in its forelegs is sufficient to raise the

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13. *United States v. Williams*, 571 F.2d 344, 350 (6th Cir. 1978) *cert. denied*, 439 U.S. 841 (1978); *United States v. FMC Corp.*, 306 F. Supp. 1106, 1138 (E.D. Pa. 1969).

14. Footnote Omitted.

15. Footnote Omitted.

16. Footnote Omitted.

17. Footnote Omitted.

18. Footnote Omitted.

rebuttable presumption that the horse was "sore," as provided in the Act, 15 U.S.C. § 1825(d)(5). Respondent has not rebutted this statutory presumption. Respondent's only explanation for the sensitivity exhibited by her stallion is that "Supreme Image" was exceptionally agitated at the time of the examination because of being confined with a mare in season." While this fact was confirmed by the Government veterinarians, and Dr. Riggins acknowledges that agitation would have affected "Supreme Image's" condition and Dr. Knowles acknowledged that his diagnostic opinion could be generally affected by a horse's agitated condition, Dr. Riggins stated that agitation would not influence the results of palpation and both veterinarians testified that they employ techniques to distinguish a pain response to their palpation examination from the behavior of a skiddish or excited horse.

Respondent's defense focused primarily on disputing that the examination report and affidavits accurately reflected the examination of "Supreme Image" on the date at issue. The testimony of respondent and her husband, Mr. Doug Crawford, advanced the averment that only one veterinarian, Dr. Riggins, physically examined "Supreme Image." Respondent and Mr. Crawford claimed that from the time of the DQP's examination until the horse was removed from the examination area, one or both of them were present to witness the events involving "Supreme Image." Mr. Crawford testified that he accompanied Cecil Jordan, the horse's trainer, to the inspection area and that he saw no veterinarian examine "Supreme Image" between the DQP's examination and the time, about a minute later, that

respondent arrived in the area.[19] Respondent stated that from the time she arrived and took the horse from Mr. Jordan, until she and "Supreme Image" left the inspection area, only one veterinarian, Dr. Riggins, physically examined the horse. Respondent also testified that Dr. Riggins made a statement during his examination to the effect that he could not find anything wrong with the horse. It was the contention of respondent and respondent's witnesses that the period during which the veterinarian was examining the horse lasted from one to two hours.

After careful consideration of the conflicting evidence in this case, it is necessary to find that when complainant's documentary evidence is viewed as reliable and probative, the clinical findings attributed to the two qualified and experienced Government veterinarians merit greater credibility and weight than the testimony of respondent and her husband. CX 1, CX 2 and CX 3 are sufficiently detailed

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19. Cecil Jordan, trainer of "Supreme Image," also testified on behalf of respondent, to deny that the USDA veterinarians examined "Supreme Image" while the horse was in Jordan's custody, from the time of the DQP exam until respondent arrived in the inspection area. Mr. Jordan also testified that the Government veterinarians informed him that they found the horse to be sore, as defined in the Act, when he returned to the inspection area as respondent was leaving with "Supreme Image." However, Mr. Jordan's testimony concerning these events impeached at hearing by his prior sworn statement [made only 1 month after the event in question] that he was "with the horse when the USDA veterinarians examined him." (CX 4 at 2) [Furthermore, Mr. Jordan's affidavit contains a spelling error, which Mr. Jordan noticed, and he initialed the correction, in the sentence immediately following his statement that he was "with the horse when the USDA veterinarians examined him." This shows that he carefully read his affidavit.]

to provide substantial evidence on which to base a decision. Under Departmental precedent, palpation by Government veterinarians, without other evidence, is sufficient to support a finding that a horse is sore. *Pat Sparkman, et al*, 50 Agric. Dec. 602, 612-613 (H.P.A. Dkt. No. 88-58) (January 24, 1991). Accordingly, it is determined that the requisite level of proof supports the conclusion that "Supreme Image" was sore when entered in the Belfast Lions Club Horse Show on August 1, 1986.[20]

Sanction

Respondent Sheryl Crawford, having been found to be the owner of a horse which was sore when entered in the Belfast Horse Show, in August 1986, is subject to the penalties required under the Act. *See Pat Sparkman, et al*, 50 Agric. Dec. 610 (H.P.A. Dkt. No. 88-58) (January 24, 1991). Complainant recommends a civil penalty of $2,000, the maximum amount permitted under the Act and disqualification from industry participation for a period of one year. According to Departmental policy, sanctions in each case will be determined by examining the nature of the violation in relation to the remedial purposes of the regulatory statute, along with all relevant circumstances, giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose. *S.S. Farms Linn*

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20. Complaint counsel need only to prove the subject allegations with a preponderance of evidence. *Leon Farrow, et al.*, 42 Agric. Dec. 1397, 1416 (P&S Dkt. No. 5893) (September 21, 1983), *aff'd in part and set aside in part, Farrow v. U.S. Dep't of Agriculture*, 760 F.2d 211 (8th Cir. 1985).

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County Inc., et al. (A.W.A. Dkt. No. 89-03) (February 8, 1991), [*aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36-3)].

The operative statute[21] provides:

> **Civil penalties; review and enforcement**
>
> (b)(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty the Secretary shall take into account all factors relevant to such determination. including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.
>
> (2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia

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21. 15 U.S.C.A. § 1825(b)(1), (2) (West 1982 and Supp. 1992).

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Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of Title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

The statute[22] also provides:

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show,

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22. 15 U.S.C.A. § 1825(c) (West 1982 and Supp. 1992).

horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit a horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

****

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent argues on appeal that Complainant failed to meet its burden of proof that Respondent's horse, "Supreme Image," was sore. However, there is much more than a preponderance of the evidence that Respondent violated the Act, as alleged in the Complaint, which is all that is required.[23] *See generally Fleming v. USDA*, 713 F.2d 179 (6th Cir. 1983).

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23. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978),

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The evidence that "Supreme Image" was sore relates almost entirely to the observations by two USDA veterinarians and the Show's Designated Qualified Person (DQP) of the reaction of "Supreme Image" to their palpation of the horse's front pasterns. That is frequently the case. As stated in *In re Edwards*, 49 Agric. Dec. 919 (1990) (Order Denying Petition for Reconsideration of *In re Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*. 119 S.Ct. 1475 (1992)), "[i]n many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns." In the original decision in *Edwards*, the Judicial Officer, in affirming the finding of the ALJ that the horses involved in the case were sore, based solely on evidence of the horses' reaction to palpation, the Judicial Officer stated (49 Agric. Dec. at 204-06):

> Respondents contend, in particular, that no thermovision was used here, but thermovision has not been used by the Department at a horse show since about 1981 (Tr. 485-86). Ample precedent exists for finding that a horse was sored, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision evidence. See, e.g., *In re Purvis*, 38 Agric. Dec. 1271, 1274-79 (1979); *In re Whaley*, 35 Agric. Dec. 1519, 1523 (1976). As stated in *Purvis, supra*, 38 Agric. Dec. at 1273-74:

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aff'd, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

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Both veterinarians determined that the horse was sored primarily because mild or light palpation of the pastern area of each front foot revealed a sensitive spot about the size of a dime on the medial surface of the bulb of the heel on the rear portion of each front foot. The sensitive spots were almost identically located on each foot, and were in the exact spot where the collar worn on the feet during the Show would "bang" as the feet moved up and down.

In *In re Whaley*, supra, 35 Agric. Dec. at 1523, it is stated:

> Respondent Groover testified that the horse was not sored. In addition, the respondents argued that complainant did not use a swab test, photographs or thermographs....[5]

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[5]As held in *In re A.S. Holcomb*, HPA Doc. No. 18, 35 Agr Dec [1165, 1167] (decided July 26, 1976), the professional opinion of a Department veterinarian based on his physical examination of a horse is sufficient to support a finding that a horse was sored.

In *In re Gray*, 41 Agric. Dec. 253, 254-55 (1982), it is stated:

> Experience in many Horse Protection Act cases over the years demonstrates that many

horses which have been sored show evidence of pain only on the anterior portion of the legs or only on the posterior portion of the legs. This is not unusual and does not discredit evidence that the horse was sore. It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore. [Footnote omitted.] Moreover, the statute raises a presumption that a horse is sore "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" (15 U.S.C. § 1825(d)(5)). There is no requirement that the horse manifest abnormal sensitivity on both the anterior and posterior surfaces of its forelimbs or hindlimbs.

In *In re Holcomb*, 35 Agric. Dec. 1165, 1167 (1976), it is stated:

It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting

> its gait. It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.

Respondents also contend that horses are typically sored on the anterior portion of the front legs, but the quotations above show that it is not unusual to have a horse sored only on the posterior portion of the front legs.

In *Edwards*, it is also explained that veterinarians can distinguish between a pain reaction from palpation and a high strung or nervous horse, or a horse that is silly about its feet, as follows (49 Agric. Dec. at 202-03):

> Respondents' reply to the section 1825(d)(5) presumption, and the Complainant's evidence, is the wholly untenable assertion that *both* horses were silly about their feet and that was the cause of their responses. This assertion is without any basis. All four United States Department of Agriculture doctors testified that they are familiar with high-strung, or nervous, or silly horses and follow a simple procedure to distinguish such horses from those that are experiencing pain. That is, they look for, and in both cases found, specific spots which were painful when palpated.

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As testified to by Drs. Riggins and Jordon, they conduct their examinations in a consistent fashion palpating different areas of the horse's front legs looking for indications of pain..

After finding what appear to be pain responses evidenced by the horse trying to jerk its foot away, they move to other parts of the leg and then return to the spot where they previously got a response. If the horse again gives a pain response they will go away from that spot and come back. This is done to be certain it is a pain response and not just a "silly" reaction. (Tr. 61, 103). As Dr. Riggins testified:

> . . . if a horse is silly about his foot, you can be holding it and you can touch him anywhere and the horse is going to move. And the way to differentiate if he's sore or not is I will - a certain spot - if that horse is moving when I touch that certain spot, I'll go around to other places. I might even go further on his leg and palpate it. And the horse, if he's silly about it, you can tell other places where I know there is no pain, he exhibits some response, I know he's kind of silly. But then I can go back, if you get pain response every time you go back there, well, then, you know it's pain instead of being silly about his foot. (Tr. 61-62).

A nervous or silly horse will have a reaction upon palpation anywhere. "Eb's Little Princess" and "Great

Big Country" both responded only when a small area was palpated and both showed the response repeatedly when palpated there, but showed no response when palpated elsewhere.

The record in the present case similarly shows that the Department's two veterinarians, one of whom had checked between 6,300 and 9,600 horses for Horse Protection Act violations over a 12-year period (Tr. 76-79),[24] and the other over 1,000 horses from 1972 to 1986 (Tr. 22-23, 42), could distinguish between a pain response to palpation and some other condition or circumstance, including agitation from being confined in a trailer with a mare "in season" (Findings 12, 20, 21). Based upon my examination of the record in this case, in addition to my examination of the records in 52 other Horse Protection Act cases, I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act.[25]

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24. Dr. Knowles testified that over a 12-year period, from 1974 to 1986, he checked 35 to 40 horses at 15 to 20 shows a year (Tr. 76-79). Using the smallest estimate, he checked about 6,300 horses (12 x 15 x 35 = 6,300); using the largest estimate, he checked about 9,600 horses (12 X 20 X 40 = 9,600).

25. The Congress acted concerning the enforcement of the Horse Protection Act in Fiscal Year 1993. A proviso in the Animal and Plant Health Inspection Service's (APHIS) "salaries and expenses" appropriation for Fiscal Year 1993, reads, in pertinent part, as follows (Pub. L. No. 102-341, 106 Stat. 873, 881-82 (1992)):

ANIMAL AND PLANT HEALTH INSPECTION SERVICE

SALARIES AND EXPENSES

(INCLUDING TRANSFERS OF FUNDS)

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For expenses, . . . to carry out inspection, quarantine, and regulatory activities; . . . $432,900,000, . . .: *Provided further*, That none of these funds shall be used to pay the salary of any Department veterinarian or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

APHIS' Fiscal Year 1993 appropriation for enforcement of the Horse Protection Act was $358,000 (H.R. CONF. REP. No. 815, 102d Cong., 2d Sess. at 20 (1992)).

An examination of the proceedings reported in the Congressional Record during the pendency of H.R. 5487 reveals no discussion of this proviso (138 CONG. REC. H5548, H5576 (daily ed. June 30, 1992); 138 CONG. REC. S10,417, S10,420 (daily ed. July 28, 1992); 138 CONG. REC. H7686, H7697, H7708 (daily ed. Aug. 6, 1992); 138 CONG. REC. H7727, H7732 (daily ed. Aug. 7, 1992); 138 CONG. REC. H7900, H7924-26 (daily ed. Aug. 11, 1992); 138 CONG. REC. S12,275, S12,276 (daily ed. Aug. 11, 1992)).

The pertinent House and Senate Committee Reports are as follows: H.R. REP. No. 617, 102d Cong., 2d Sess. at 48 (1992); S. REP. No. 334, 102d Cong., 2d Sess. at 49 (1992); H.R. CONF. REP. No. 815, 102d Cong., 2d Sess. at 20-21 (1992). Although the House Committee Report states that "relying on digital palpation of a horse's pastern as the exclusive means of diagnosing horses is ineffective," the comments were apparently not based upon any hearings on the issue, and USDA has not testified, or otherwise commented, upon the issues underlying the views in the House Committee Report, or the views in the Senate Report recommending" bill language directing APHIS to discontinue its practice of relying on digital palpation as the only diagnostic test . . . to determine whether or not a horse is sore under the act." The proviso only applies to the 1993 Fiscal Year (October 1, 1992-September 30, 1993). There is nothing in the legislative history to suggest that Congress intended any of this to be retroactive.

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An examination of APHIS' Fiscal Year 1994 appropriation for the Horse Protection Act does not reveal any restrictive language, like that in the 1993 appropriation (PUB. L No. 103-111, 107 Stat. 1046 (1993)).

The pertinent House and Senate Committee Reports are as follows: H.R. REP. No. 153, 103d Cong., 1st Sess. at 44-45 (1993); S. REP. No. 102, 103d Cong., 1st Sess. at 46, 48 (1993); H.R. CONF. REP. No. 212, 103d Cong., 1st Sess. at 22-23 (1993).

The House Report contained no limiting language concerning HPA enforcement, but provided increased funding from FY 1993-($358,000) to FY 1994" ($481,000). The Senate Report recommended identical statutory language in FY 1994 as in the FY 1993 appropriation for HPA enforcement, and increased funding by only $3,000, as follows:

> *Horse protection.*-The Committee recommends bill language identical to that in the 1993 act requiting APHIS not to rely solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under the Horse Protection Act.

However, the Conference Report adopted the House Report position--no limiting language in the statute, and increased funding to $481,000--but, the conferees explained the compromise in this way:

> Amendment No. 48: Deletes Senate language providing that APHIS veterinarians may not use digital palpation as the only diagnostic test used to determine horse soring. The House bill contained no similar provision.

Funding provided in the bill to carry out activities of the Horse Protection Act includes an increase of $120,000. The conferees agree that these additional funds should be used to purchase thermograph machines and to provide additional training and evaluation. Neither these machines nor digital palpation should be used as the sole means to determine whether soring has occurred, but they should be used as additional diagnostic tools.

Here, as before, there is nothing in the 1994 legislative history to suggest that Congress intended any of this to be retroactive.

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Virtually all Respondents in these types of cases complain that USDA veterinarians are using digital palpation solely, and only digital palpation, to determine whether horses are sore. However, such subjective conclusions by USDA veterinarians in Horse Protection Act cases are not actually dispositive of this issue. In fact, USDA veterinarians are merely providing evidence, through their diagnosis, to fact-finders, who then determine if a particular horse is sore under the Act. This was very recently stated in *Elliott v. Administrator*, APHIS, 990 F.2d 140, 145-46 (4th Cir. 1993), cert. denied. 114 S.Ct. 191 (1993), as follows:

> Elliott also argues that the Act is vague because it fails to establish uniform standards for examination and diagnoses by USDA veterinarians. In other words, he complains that the determination of "sore" depends on the subjective conclusion of the USDA veterinarian. In fact, the fact-finder makes the determination as to whether or not a horse was "sore". The USDA veterinarians merely provided evidence, through their diagnosis, as to whether or not this is the case. Their findings are subject to the same scrutiny as any other evidence. As one court ably put it:
>
> > [A]ccepting that the opinions of the examining veterinarians are subjective to a degree, that subjectivity is no more than that inherently present whenever expert opinion is used for evidentiary purposes in adjudicative proceedings. The evidentiary use of expert opinions, in particular those supported by live

testimony and subject to the defendants' cross-examination, does not violate the due process clause.

See e.g., Richardson v. Perales, 402 U.S. 389, 408 (1971); *Lloyd Sabaudo Society v. Elting*, 287 U.S. 329, 339-340 (1932).

Fleming v. USDA, 713 F.2d 179, 186 (6th Cir. 1983).

Furthermore, in the present case, there is slightly more than just digital palpation to form the basis for the conclusion that the horse was sore. The Summary of Alleged Violations form, in item 29, under the heading "WAY OF GOING (*Explain if significantly abnormal*)," states: "Fair" (CX 1, item 29). Dr. Riggins, who prepared the form, testified that this meant that the horse was reluctant to be led, and did not lead with a loose rein and walk normally (Tr. 35-36, 56-58). Dr. Knowles, who signed the form, testified that the term "Fair" meant that the horse led with a "fairly tight rein but it didn't require a lot of bullying to get the horse to move" (Tr. 88). Considering the entire record, there is no basis for overturning the ALJ's finding that the horse was sore.

Respondent argues that neither of the Department's VMOs had independent recollection of their examinations of "Supreme Image." However, "past recollection recorded" in the form of affidavits has long been regarded as adequate, in Horse Protection Act cases, as long as the affidavits were made while the events recorded were fresh in the witnesses' minds, as follows (*In re Jordan*, 51 Agric. Dec. 1229, 1229-30 (1992)):

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The ALJ did not regard Complainant's documentary evidence (the USDA veterinarians' examination report (VS Form 19-7) and the two veterinarians affidavits) as probative because the ALJ concluded that the two "Government veterinarians had no present recollection of their examination of the horse at the time of their testimony at hearing, and so, CX 1, CX 2, CX 3, constitute hearsay." (Initial Decision at 9). He further concluded that the recorded recollections fail to provide the needed indicia of trustworthiness (Initial Decision at 10-15).

But, past recollection recorded is considered reliable, probative and substantial evidence, and fulfills requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if the affidavits were made while the events recorded were fresh in the witnesses' minds, as stated in *In re Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)):

> Respondents complain that complainant's evidence should be disregarded because it is "based upon past recollection recorded and not independent memory" (Appeal 1). However, respondents did not object to the admission of such evidence and, therefore, they are not in a position to complain now. Moreover, complainant's witnesses made their affidavits while the events recorded were fresh in their minds, and such evidence is "reliable, probative, and substantial," as required by the

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Administrative Procedure Act (5 U.S.C. § 556(d)).

The ALJ and Respondent believe that the Summary of Alleged Violations form (CX 1) and the affidavits of the Department's VMOs lack credibility, but I find the alleged shortcomings to lack substance. Although the exhibitor number on the Summary of Alleged Violations form was erroneously shown as "360," instead of "660," Dr. Riggins who prepared the form (Tr. 33, 35-36), testified that the information at the top of the form (which includes the exhibitor number) is obtained from the DQP or the custodian (Tr. 33-34). His affidavit shows the correct number, "660" (CX 3). Furthermore, the Summary of Alleged Violations form accurately states the horse's name, color, age, sex, owner, trainer, and class. Hence, the incorrect exhibitor number is of no serious consequence.

The ALJ further states that the Summary of Alleged Violations form does not show the date it was prepared, but the date and approximate time of the event are shown in CX 1, item 4, as "8/1/86 10:00 PM." Both VMOs testified that the form was prepared the same night as the examination (Tr. 69-70, 105). This objection, too, lacks substance.

Finally, the ALJ notes that the form fails to show that the horse was excused from performing (CX 1, item 18). But the horse was admittedly found to be sore at the preshow examination, and no horse found sore at a pre-show examination is ever allowed to perform at a show. Hence this omission is of no consequence.

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On the other hand, the form expressly states that the horse was found to be sore (CX 1, item 33), and the finding of soreness is explained in the diagrams of the horse's pasterns, showing the exact spots where the VMOs found an "Extreme response" and a "Strong response" (CX 1, item 35). The form is signed by both VMOs (CX 1, item 39). Accordingly, the form is strong evidence supportive of Complainant's case.

As to the affidavits, the ALJ notes that Dr. Riggins' affidavit is dated August 15, 1986, 14 days following the show. But Dr. Riggins testified that he uses the Summary of Alleged Violations form in preparing an affidavit, and sometimes notes (Tr. 29-30). Hence, at the very least, Dr. Riggins had the Summary of Alleged Violations form, which he prepared the night of the examination, to refresh his recollection when he prepared his affidavit.

Dr. Knowles' affidavit is dated Monday, August 4, 1986, only 3 days after the examination. That is sufficiently close that the events were still fresh in his mind. Furthermore, he testified that the affidavit would routinely have been prepared the next day, Saturday morning, and he would have signed the affidavit at his office on Monday before a Department employee authorized to administer oaths (Tr. 91-93). I find insignificant the fact that Dr. Knowles originally typed "360" as the exhibitor number, and corrected it in pen and ink to show "660" (CX 2), for the same reasons stated above as to the incorrect exhibitor number on the Summary of Alleged Violations form.

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In short, the Summary of Alleged Violations form and affidavit were entitled to be regarded as having a high degree of credibility.

The Summary of Alleged Violations form and the affidavits, together with the testimony of the VMOs, clearly established a prima facie case that the horse was sore. In addition, a statutory presumption of soreness was established by virtue of the finding of abnormal sensitivity in both of its forelimbs (15 U.S.C. § 1825(d)(5)). I agree with the ALJ that Respondent did not rebut the presumption or the prima facie case that the horse was sore (see Revised Initial Decision at 14-16) for the same reasons as set forth in the Fourth Circuit's *Elliott* decision, *supra*, 990 F.2d at 146, as follows (emphasis added):

> Elliott further contends that the ALJ impermissibly relied on the statutory presumption that if a horse is "abnormally sensitive" it is deemed to be "sore." 15 U.S.C. § 1825(d)(5). Elliott argues that "abnormally sensitive" is so vague as to be violative of due process and that equating "abnormal sensitivity" to deliberate treatment to render a horse "sore" is an unwarranted and unsupported presumption. We find it unnecessary to consider the presumption established by § 1825(d)(5) in light of the direct evidence that the horses were "sore." *The examining veterinarians did not simply conclude that the horses were abnormally sensitive in two limbs and, therefore, were "sore." Each veterinarian testified to the effect that the three*

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horses plainly experienced a high degree of pain upon palpation of their forelimbs, demonstrated by the horses' immediate and reflexive pulling away from the palpation, rearing up and sagging down on the hindquarters, and instinctively cinching up the abdominal muscles. The diagnosis was not based upon mere abnormal sensitivity. The veterinarians specifically opined that the pain responses were not the result of some other type of injury but rather were deliberately inflicted. *In other words, the horses, when inspected, were "sore" within the meaning of the Act.* As previously discussed, the veterinarians noted other conditions indicating the horses were "sore": (1) hair loss which indicated the use of action devices or caustic chemicals; (2) inflammation in the forelimbs; and (3) unusual stance, movement and expression. *The testimony was in the form of professional opinions linking cause and effect, not simple reliance on a statutory presumption. Although the ALF cited the presumption, his opinion clearly shows he determined, based on the evidence presented, that the animals were "sorer on the days they were "entered."* Unquestionably, substantial evidence supports those conclusions. [Footnote omitted.] Where there is a factual finding that a horse was "sore", even in the absence of the presumption, it is irrelevant that there may have been reliance on a presumption. *Thornton v. USDA*, 715 F.2d 1508, 1511 (11th Cir. 1983) (*citing Fleming v. USDA*, 713 F.2d 179, 188 (6th Cir. 1983)). we, therefore, find it unnecessary to examine whether or not the presumption passes constitutional muster.

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See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

The fact that "Supreme Image" was not found to be sore the next night at a different show is no indication that the horse was not sore the previous night. Both VMOs testified that a horse that is sore on one night would not necessarily be sore the next night (Tr. 47-48, 107-08). In addition, as noted in the House Report on the 1976 amendments to the Act, 'sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances" (H.R. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976)).

Respondent further contends that she was not notified that night that her horse was sore, in time for her to have the horse examined by someone else, but her agent, the custodian and trainer of the horse, Cecil Jordan, was admittedly advised on the night of the show that the horse was found to be sore (Tr. 130; and see CX 1, item 8; CX 2. 3).

Respondent's evidence that the examination of her horse lasted from 1 to 2 hours is not credible, considering the record as a whole. But, even if the examination did take that long it would not have been unreasonable within the meaning of 15 U.S.C. § 1893(e).[26] Furthermore, even if an

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26. **(e) Inspection by Secretary or duly appointed representative**

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may

examination lasted an unreasonable amount of time, within the meaning of 15 U.S.C. § 1823(e), that would not be a basis for nullifying a finding that a horse was sore.

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Earms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

> It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, *viz.*, that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

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inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner.

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Concerning the civil penalty, the Act requires that the Secretary consider the following factors to determine the amount of a civil penalty (15 U.S.C. § 1825(b)(1)):

> [T]he nature, circumstances, extent and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matter as justice may require.

In most cases, the maximum civil penalty of $2,000 per violation is warranted (*In re Stamper*, 42 Agric. Dec. 20, 62 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992) (Excerpt from *Stamper* attached as an Appendix hereto); *In re Elliott*, 51 Agric. Dec. 334, 350-51 (1992) (Decision as to William Dwaine Elliott). aff'd. 990 F.2d 140 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 191 (1993). The ALJ made the determination that the violation in this case deserved the routinely appropriate amount of $2,000 for the first offense. I agree with that determination.

The ALJ also concluded that a year's disqualification is warranted. Recent cases and those decisions going back to the passage of the disqualification amendment to the HPA in 1976[27] show that a 1-year minimum disqualification

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27. The disqualification provision was added by Congress in 1976 to provide a strong deterrent to subsequent violations by parties who had the economic means to pay the civil penalties as operation costs. See H.R. REP. NO. 1597, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976

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ordinarily accompanies a civil penalty for a soring violation. This policy was recently restated in *In re Elliott*, *supra*, 51 Agric. Dec. at 352:

> The imposition of a period of disqualification is discretionary. However, a disqualification period had been recommended by APHIS, and the Judicial Officer has held that disqualification is an appropriate sanction in almost every Horse Protection Act case. In *In re Rowland*, the Judicial Officer noted (40 Agric. Dec. at 1951-52 [, afford 713 F.2d 179 (6th Cir. 1983))]:
>
> > Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In order to achieve the Congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of his horses to be exhibited while sore.[10]

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[10][There is a remote possibility that the circumstances in some particular case, not presently envisaged, might justify a departure from that policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation,] I can envisage no

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U.S.C.C.A.N. 1696, 1706. *In re Rowland*, 40 Agric. Dec. 1934, 1934-49 (1981), aff'd, 713 F.2d 179 (6th Cir. 1983).

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circumstance presently warranting an exception from this policy.[28]

For the reasons set forth in *Stamper*, attached as an Appendix, the customary, minimum disqualification period should be imposed here.

Respondent's primary fear is that any penalty could cause her to lose her license as an independent insurance agent. She testified that to be licensed, you have to be a very trustworthy and reputable person (Tr. 190). In addition, her carrier must renew her certificate of authority each year in order for her to be able to write insurance for the carrier (Tr. 191). However, there is no rational basis for any State or private insurance authority to use the violation

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28. It is my policy to examine the facts and circumstances of each case to see whether an exception to this policy is warranted. An examination of the record here does not lead me to believe that an exception is warranted. In this respect, however, I am necessarily influenced by the views expressed in *Stamper* (attached as an Appendix) as to why lack of knowledge or intent should not be a circumstance mitigating the sanction. Since there is never, or almost never, proof of knowledge or intent, if that were cause for not imposing a disqualification order, there would never, or almost never, be a disqualification order issued. The civil penalty for soring would be an acceptable cost of doing business, and the remedial purposes of the Act would not be achieved. But if the *Stamper* views are correct, *viz.*, that a disqualification order is ordinarily necessary to achieve the Act's purpose even where there is no proof of knowledge or intent, it would take an extraordinary circumstance to warrant not imposing a disqualification order.

in this case as the basis for withdrawing or failing to renew her insurance license or certificate. I fully believe Respondent's testimony that she had no knowledge that her horse was sore, and that she had instructed her trainer not to sore her horse, or injure it in any manner. Her violation in allowing the entry of a horse that was found to be sore does not reflect in the slightest on her character as a trustworthy and reputable person suitable to act as a fiduciary in insurance transactions involving many thousands of dollars (Tr. 190). Nonetheless, in order to achieve the congressional purpose of this remedial Act, the owner of a horse who allows the entry of a horse found to be sore must be held responsible irrespective of the fact that the owner did not know the horse was sore and had instructed the trainer not to sore the horse (see Stamper, supra, attached as an Appendix).

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Sheryl Crawford is assessed a civil penalty of $2,000. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

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2. Respondent Sheryl Crawford is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. The provisions of the disqualification order shall become effective on the 30th day after service of this Order on Respondent.

Done at Washington, D.C.
November 19, 1993

/s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

APPENDIX

Excerpt from *In re Stamper*, 42 Agric. Dec. 20, 44-63 (1983), aff'd, 722 F.2d 1483 (9th Cir. 1954), *reprinted in* 51 Agric. Dec. 302 (1992).

IV. Lack of Intent or Knowledge, and Passing Pre-Show Inspection, Irrelevant.

As shown in this section, it is irrelevant under the Horse Protection Act that an owner or exhibitor has no intent to sore a horse o knowledge that the horse being exhibited is sore. It if further irrelevant that the horse is examined by a Designated Qualified Person and found to be sound during a pre-show inspection

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The Act makes it unlawful for a person to show or exhibit a sore horse, or for an owner to allow the showing of a sore horse. Specifically, the Act provides (15 U.S.C. § 1824 (2)):

§ 1824. Unlawful acts

The following conduct is prohibited

****

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in a horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

No requirement is set forth in the Act that such unlawful conduct be done with unlawful intent or knowledge, and there is no basis for reading such a requirement into the Act.

A. Intent.

The Horse Protection Act, as originally enacted in 1970, required proof of intent to sore a horse. Specifically, the statutory definition in the Act provided (15 U.S.C. § 1821(a) (1970)):

(a) A horse shall be considered to be sored if, for the purpose of affecting its gait--

(1) a blistering agent has been has been applied after December 9, 1970, internally or

> externally to any of the legs ankles, feet, or other parts of the horse;
>
> (2) burns, cuts, or lacerations have been inflicted after December 9, 1970, on the horse;
>
> (3) a chemical agent, or tacks or nails have been used after December, 9, 1970, on the horse; or
>
> (4) any other cruel or inhumane method or device has been used after December 9, 1970 on the horse including, but not limited to, chains or boots;
>
> which may reasonably be expected (A) to result in physical pain to the horse when walking, trotting, or otherwise moving, (B) to cause extreme physical distress to the horse, or (C) to cause inflammation. [Emphasis added.]

As set forth in § I, supra, the statutory definition as amended in 1976 does not require that the soring agent (such as chains) be used for the purpose of affecting the horse's gait, or that it be reasonably expected to result in physical pain. In view of the contrast between the definition of "sored" in the 1970 Act and in the 1976 amendment now in effect, there is no need to resort to legislative history to show that proof of intent is not now required. But, in any event, the legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H. Rep. No. 94-1174, 94th Cong., 1st Sess. 3,4 (1975). Specifically,, it is stated in H. Rep. No. 94-1174, 94th Cong., 2d Sess. 1-2

(1976), reprinted in [1976] 3 U.S. Code Cong. & Ad. News 1696:

> The legislation makes the following substantive modifications in the existing law governing this program:
>
> 1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

For the foregoing reasons, an owner's or exhibitor's lack of intent to sore a horse is entitled to zero weight in determining whether a violation occurred.

B. Knowledge

As set forth above at the outset of this section (§ IV), the Act does not require that an exhibitor or owner have knowledge that the horse is sore (15 U.S.C. § 1824(2)). This is in striking contrast to the statutory requirements immediately before and immediately following the provisions at issue here. In three other subsections of the same section of the statute involved here. In three other subsections of the same section of the statute involved here, Congress makes certain conduct unlawful only if a person "has reason to believe that such horse is sore," or has "knowledge that the horse is sore" (15 U.S.C. § 1824(1), (5) and (6)). In addition, the section of the Horse Protection

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Act following the section at issue here uses the word "knowingly" 10 times (15 U.S.C. § 1825).

The section of the Act at issue here and the statutory provisions immediately preceding and following it are as follows (15 U.S.C. §§ 1824-1825) (emphasis added)):

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse y a common course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a

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horse which is sore by the owner of such horse. [This is the subsection at issue here.]

****

(5) The failure by the management of any horse show or horse exhibition, which has appointed and retained a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse (A) which is sore, and (B) after having been notified by such person or the Secretary that the horse is sore or after otherwise having knowledge that the horse is sore.

(6) The failure by the management of any horse sale or auction which has appointed and retained a person in accordance with section 1823 (c) of this title, to prohibit the sale, offering for sale, or auction of any horse (A) which is sore, and (B) after having been notified by such person or the Secretary or after otherwise having knowledge that the horse is sore.

****

§ 1825. Violations and penalties

(a) Criminal acts and penalties

(1) Except as provided in paragraph (2) of this subsection, any person who knowingly violates section 1824 of this title, shall upon conviction

thereof, be fined not more than $3,000, or imprisoned for not more than one year, or both.

(2)(A) If any person knowingly violated section 1824 of this title, after one or more prior convictions of, such person shall upon conviction thereof, be fined not more that $5,000, or imprisoned for not more than two years, or both.

(B) Any person who knowingly makes, or causes to be made, a false entry or statement in any report required under this chapter; who knowingly makes, or causes to be made, any false entry in any account, record, or memorandum required to be established and maintained by any person or in any notification or other information required to be submitted to the Secretary under section 1823 of this title; who knowingly neglects or fails to make or cause to be made , full, true, and correct entries in such accounts, records, memoranda, notification, or other materials; who knowingly removes any such documentary evidence out of the jurisdiction of the United States; who knowingly alters, or by any other means falsifies any such documentary evidence; or who knowingly refuses to submit documentary evidence to the Secretary for inspection and copying shall be guilty of an offense against the United States, and upon conviction thereof shall be fined not more than $5,000, or imprisoned for not more than three years or both.

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(b) Civil penalties; review and enforcement

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(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition or horse sale or auction, or management thereof, collectively and severally, which knowingly allows any person who is under an order disqualification to show or exhibit any horse,

> to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation.

The inclusion of the "reason to believe," "knowledge" and "knowingly" language in some subsections of the Horse Protection Act, while omitting it in the subsection involved here, shows clearly that Congress intends to prohibit showing or exhibiting a horse which is sore, or allowing such conduct by the owner, irrespective of whether the exhibitor or owner knows or has reason to believe that the horse is sore. See Lang v. Commissioner, 289 U.S. 109, 111-12 (1933); United States v. Atchison, T. & S. F. Ry. Co., 220 U.S. 37,44 (1911) Corn Products Refining Co. v. Benson, 232 F.2d 554, 562 (2d Cir. 1956); Hamilton v. N.L.R.B., 160 F.2d 465, 470 (6th Cir.), cert. denied, 332 U.S. 762 (1947).

Furthermore, this is remedial legislation which should be liberally construed to achieve the Congressional purpose in enacting the statute (see the cases cited in In re American Fruit Purveyors, Inc., 30 Agric. Dec. 1542, 1593 (1971)). In the 27 Horse Protection Act cases I have reviewed, there has never been proof that the owner or exhibitor had knowledge that the horse was sore. And I never expect to see such proof in any case brought under the Act. Accordingly, if the Congressional purpose is to be achieved, this remedial Act must not be emasculated by reading into

the statute a requirement that the exhibitor or owner know that the horse was sore.

In some cases, it would be possible to infer knowledge, buy in many cases it would not be possible even to infer knowledge. If the remedial purposes of the Act are to be realized, the requirement of knowledge must not be read into the statute.

It has been the settled and contemporary administrative construction of the Act that knowledge is not required. In re Purvis, 38 Agric. Dec. 1271, 1278-79 (1979) (involving a 1974 violation); In re Whaley, 35 Agric. Dec. 1519, 1526 n 16, 1527 {1976) (involving 1972 violations}; In re Holcomb, 35 Agric. Dec. 1165, 1167, 1174 (1976) (involving a 1972 violation).[29] The administrative construction is, therefore, entitled to significant weight. United States v. Zucca, 351 U.S. 91, 96 (1956).

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29. It was held in these cases, involving violations prior to the 1976 amendments, that an owner who had no knowledge that his horse was sore was responsible for a soring violation even if he hired an independent contractor to train his horse. The same rule has been applied as to violations occurring subsequent to the 1976 amendments. *In re Crowder*, 40 Agric. Dec. 33, 41 (1981). *Accord, In re Thornton*, 41 Agric. Dec. 870, 875, 881, 889, 913-24 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982); *In re Rowland*, 40 Agric. Dec. 1934, *In re Livolsi*, 39 Agric. Dec. 1396, 1405 (1980), aff'd per curiam, No. 81-1008 (3d Cir. Sept. 21, 1981); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (all holding owners responsible for soring violations without proof of knowledge that their horses were sore).

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For the foregoing reasons, an owner's or exhibitor's lack of knowledge that a horse was sore is entitled to zero weight in determining whether a violation occurred.

C. Pre-Show Inspection.

All horses found to be sore by the Department in a post-show examination have been found sound in a pre-show inspection b a person appointed by the show's management to disqualify sore horses (see 9 C.F.R. §§ 11.7, 11.20). That is because the Act makes it unlawful for show-management to fail to disqualify a sore horse, unless they have appointed a qualified person to inspect horses for compliance with the Act (15 U.S.C. §§ 1823(c), 1824(3)).

It has been recognized in numerous cases that the pre-show inspection has inherent limitations and shortcomings.[30] The person conducting the pre-show inspection, usually a Designated Qualified Person, ordinarily is a lay person who does not have qualifications equal to those of the Department's veterinarians.[31] The DQP must inspect all of the horses in the class, which frequently allows only 1 1/2 to 2 minutes per inspection. The Department's

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30. See In re Thornton, 41 Agric. Dec. 870, 886-90 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982); In re Rowland, 40 Agric. Dec. 1934, 1943-45 (1981), appeal docketed, No. 82-3015 (6th Cir. Jan. 8, 1982); In re Crowder, 40 Agric. Dec. 33, 40-41 (1981); In re Wall, 38 Agric. Dec. 1437, 1442-43 (1979), aff'd as to evidentiary issues but rev'd as to sanction, No. 79-3714 (6th Cir. 1981) (unpublished order), 40 Agric. Dec. 927.

31. In the present case, although the DQP was a lay person, he was a highly capable person in whom the Department had confidence.

veterinarians examine only a few horses from each class, which allows them to take 10 or 20 minutes per examination, or more if needed.

The pre-show physical inspection of a horse's pasterns usually involves a determination by a single individual, the DQP, whereas the Department generally has two or more veterinarians palpate the horse, with only a unanimous decision resulting in a violation. Frequently, the Department has a thermovision machine available to corroborate the findings of the physical examinations. (A thermovision machine was not available at the Show involved here.)

"Finally, a quick-acting, short-lasting anesthetic can be applied to a horse's legs a few minutes prior to the pre-show examination, which would dissipate in about 15 to 20 minutes, thereby masking pain symptoms during the pre-show examination but enabling the horse to perform as intended during the show (Tr. 266-67)." In re Thornton, 41 Agric. Dec. 870, 889 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982), quoting form In re Rowland, 40 Agric. Dec. 1934, 1944 (1981), appeal docketed, No. 82,3015 (6th Cir. Jan. 8, 1982).[32] Congress recognized that

32. Judge Baker erred in preventing complainant from introducing evidence as to the techniques which can be employed to enable an unsound horse to pass the pre-show inspection (Tr. 264-73). Even though complainant was admittedly not going to offer evidence that such techniques were used here, such evidence is relevant to an understanding of the inherent shortcomings of any pre-show inspection.

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"sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances" (H. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976), reprinted in [1976] 3 U.S. Code Cong. & Ad. News 1700).

Where action devices are worn on a horse, as in the present case, there is an additional reason why the pre-show inspection is entirely irrelevant as a circumstance to discredit the post-show examination. As stated in In re Thornton, 41 Agric. Dec. 870, 887 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982), quoting from In re Rowland, 40 Agric. Dec. 1934, 1942-43 (1981), appeal docketed, No. 82-3015 (6th Cir. Jan. 8, 1982):

> Respondents rely on the fact that "Masterpiece Queen B" passed a pre-show examination, but that is true in every Horse Protection Act case. The fact that a horse passes a pre-show examination can never be a circumstance discrediting the post-show examination where, as here, the horse wore action devices in the ring.
>
> A horse might be on the borderline of showing pain during the pre-show examination, as a result of prior work-outs with training devices, or deliberate soring means, and yet not be at the threshold of pain detectable by palpation during a pre-show examination. After the horse is exhibited in the ring with action devices, the action devices could raise the pain to the level easily discernible upon the post-show examination (Tr. 46-48, 64, 69, 93-95, 100,

176-78, 180-82, 188-90, 259, 315-17). Since soring can occur in the show ring because of action devices bouncing up and down on the horse's pasterns, a pre-show examination is no more relevant to discredit a post-show examination than an examination conducted a month before the show.[33]

The folly of relying on a pre-show inspection to discredit a post-show examination, where action devices are used on the horse, is highlighted by the present case. In the present case, Mr. Hartman, the Designated Qualified Person who found the horse to be sound in the pre-Show inspection, is one of the persons who found the horse to be sore in the post-Show examination (Findings 7 and 13). It is hardly rational to argue that Mr. Hartman's pre-Show inspection discredits the post-Show examination when Mr. Hartman participated in the post-Show examination and concurred in the findings of the Department's veterinarians.[34]

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33. This circumstance is a strong argument in favor of adopting the proposal now being considered by the Department to prohibit the use of all action devices in horse shows. At present, horse owners and exhibitors are faced with a dilemma. To have an equal chance of winning, they must use action devices, since others are using them. But they cannot be sure that the action devices will not cause the horse to be sored under the Act and regulations. (In the present case, the soring was too severe to have occurred solely in the show ring (Tr. 35-36,41, 70, 189-90, 267)).

34. It would be good practice in all Horse Protection Act cases to have the DQP participate in the post-show examination, except for the fact that generally he is too busy conducting pre-show inspections.

For the foregoing reasons, the fact that Mr. Hartman found "Red Bluff's Playboy" to be sound during the pre-Show inspection has zero weight in detracting from the post-Show examination of "Red Bluff's Playboy."

D. Eighth Circuit's Burton Decision Erroneous.

In In re Burton, 40 Agric. Dec. 1738, 1745 (1981), and In re Blades, 40 Agric. Dec. 1725, 1733-37 (1981), the Judicial Officer held that LeRoy Franks, the owner of the horses involved in those cases, was responsible for the violations irrespective of whether he had knowledge of the violations or reason to believe that his horses were sore. In reversing, the Court of Appeals held (Burton v. U.S.D.A., No. 81-2445, slip op. at 4-5 (8th Cir. July 26, 1982)):

> The central issue on appeal is what Congress intended the word "allow" to mean in 15 U.S.C. § 1824 (2)(D) of the Horse Protection Act. The Secretary argues that Congress intended to connote a positive duty on owners to prevent the soring of their horses. In other words, the Secretary urges that owners be held to a strict liability standard, and that knowledge of the horse's "soreness" is not required under 15 U.S.C. § 1824 (2)(D). The Secretary offers no support in the way of case law or legislative history to support this assertion.

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LeRoy Franks, on the other hand, argues that the term "allow" requires that one must know the horse was "sore" at the time it was exhibited. In both of these cases, the record clearly shows that he did not in fact have knowledge that his horses were being shown in a sore condition.

Absent clear, expressed intend by Congress to hold owners of horses strictly liable for violation of the Horse Protection Act, 15 U.S.C. § 1824(2)(D), we hold that the owner cannot be held to have "allowed" a "sore" horse to be shown when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

In both cases, we find that all of the above requirements were met. Therefore, we reverse the Secretary and find that LeRoy Franks did not "allow" his horses to be shown in a "sore" condition in violation of 15 U.S.C. § 1824(2)(D).

As shown in subsection B of this section, the fact that the owner had no knowledge that the horse was sore is entitled to zero weight.

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As shown in subsection C of this section, the fact that a Designated Qualified Person examined and approved the horse before entering the ring is entitled to zero weight.[35]

As shown in subsection A of this section, the fact that the owner has no intent to sore a horse is entitled to zero weight. (The court's criterion that the owner has "directed the trainer not to show a "sore" horse" is equivalent to the criterion that he has no intent to show a "sore" horse.)

The sum of three zeros is zero!

The facts underlying the three factors listed by the Court in Burton appear in every case against an owner and, therefore, the Court's holding, for all practical purposes, repeals the repeals the Act insofar as horse owners are concerned.

As to the Court's first factor, there has never been a case where the evidence showed that the owner knew that a horse was sore when exhibited, and it is not likely that such proof will ever be obtained.

As to the second, every horse show has a person designated to conduct a pre-show inspection for the purpose of excluding sore horses, and every horse found to

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35. Action devices were used on LeRoy Franks' horses, involved in Burton, between the pre-Show inspections and the post-Show examinations.

be sore by the Department has previously been approved during the pre-show inspection.

As to the third factor, the uncontradicted evidence or inference in every case is that the owner has told the trainer not to sore the horse or show a sore horse. It is not likely that such evidence will ever be contradicted. There are compelling reasons to prevent a trainer from saying that the owner told him to sore a horse. First, such evidence would not relieve the trainer of any responsibility for his own violation. Moreover, it would undoubtedly insure that the trainer would not be hired by owners in the future.

Furthermore, it is quite likely that all owners tell their trainers not to sore their horses. The problem is that the owners also let the trainers know that they expect good results. In addition, a trainer's ability to attract and retain owners as clients depends upon his reputation and record. Accordingly, unless owners do more that give trainers pious platitudes about not soring horses, horses will continue to be sored on a vast scale.

If an owner were really serious about not having a horse sored, I have no doubt that result could be achieved by adding a liquidated damage clause to the trainer's contract imposing a large (e.g., $25,000) monetary penalty on the trainer if he exhibits a sore horse.

The practical effect of the Eighth Circuit's Burton decision is to preclude enforcement of the Act against a horse's owner. In fact, under Burton it would be

improvident to bring any future cases against owners in view of the Equal Access to Justice Act (5 U.S.C. § 504 (Supp. IV 1980)) authorizing the award of fees and expenses, where appropriate, to prevailing parties.

However, as shown above, there is no basis for reading into the Act an exception where an owner does not intend to sore his horse, does not know that the horse is sore, and the horse passes a pre-show inspection by a Designated Qualified Person.

As indicated above in subsection B of this section (see text accompanying note 7, supra), it has been the settled and contemporary administrative construction of the Act that an owner is responsible for a soring violation even if he had no knowledge that the horse was sore. The rationale for that construction is set forth above. After setting forth the basis for that administrative construction, it is stated in In re Thornton, 41 Agric. Dec. 870, 914-16 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982), quoting from In re Roland, 40 Agric. Dec. 1934, 1946-47 (1981), appeal docketed, No. 82-3015 (6th Cir. Jan. 8,1982), and In re Whaley, 35 Agric. Dec. 1519, 1526 (1976):

> Assuming, however, for the sake of argument, that the pre-hearing stipulation were abrogated, I would hold that an owner of a horse is responsible for a violation of the Horse Protection Act even if he hired an independent contractor[36] to train and

36. The "term 'independent contractor' is used to indicate all persons for whose conduct *** the employer is not responsible except in the

exhibit the horse, with the owner having no contractual right to control the trainer's activities. Cf. United States v. Parfait Powder Puff Co., 163 F.2d 1008, 1009-1010 (C.A. 7), certiorari denied, 332 U.S. 851. The prestige, money[37] and recognition that come from a winning horse accrue mainly to the owner of the horse. If an owner can reap the benefits of winning with a sored horse and insulate himself from any liability arising therefrom, he can directly or indirectly put great pressure on the trainer of the horse to win al all costs. Such pressures might cause trainers to sore horses which could not be trained to win by other means, either because the trainers do not possess the requisite ability to successfully train the horses or because the horses are not good Tennessee Walking Horses to begin with. Soring horses is not only cruel to the animals and unfair to competitors, but "may seriously harm the breed itself," through the use of

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performance of nondelegable duties" (emphasis supplied; Restatement of the Law, Second, Agency 2d (1958), Comment b to Section (2), p. 14). Where a horse owner hires an independent contractor to train and exhibit his horse, the duty of the owner under the Horse protection Act not to exhibit a sored horse should be regarded as non-delegable, in order to achieve the remedial purposes of the act.

37. Great monetary reward can result from the increased value of a winning horse for sale or breeding purposes. See Hearing before the Senate Subcommittee on Energy, Natural Resources, and the Environment of the Committee on Commerce, 91st Cong., 1st Sess., on S. 2543 (Serial 91-27), p. 36; H. Rep. No. 91-1597, 91st Cong., 2d Sess., p. 3; H. Rep. No. 94-1174, 94th Cong., 2d Sess., p. 4. See, also, Tr. 10, 183, 214-217.

> poor horses (which performed well because of soring) as studs. H. Rep. No. 91-1597, 91st Cong., 2d Sess., pp. 2-3. See also H. Rep. No. 94-1174, 94th Cong., 2d Sess, p.4. In order to achieve the Congressional purpose in enacting this remedial statute, it should be liberally construed (see the cases cited in In re American Fruit Purveyors, Inc., 30 Agr Dec 1542, 1593, (1971)). Specifically, the Act should be construed so as to make the owner of a sored horse exhibited in violation of the Act subject to the penalties of the Act.[38]

In the present case, Eldon Stamper (co-owner) was an experienced, knowledgeable horse breeder. He has as many as six brood mares at one time (Tr. 458). He took an active interest in his horses.

Eldon Stamper observed "Red Bluff's Playboy" being warmed-up "[e]very time he was shown" (Tr. 462), including the warm-up preceding the Show at issue here (Tr. 459-62). He was with his horse in the stall before he was taken to the DQP for inspection (Tr. 459), and he

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38. Section 11.1(s) of the regulations (9 CFR 11.1(s)) defines the term "exhibitor" as "the owner or other person who enters a horse in any horse show or exhibition." Hence either one, or both, may be the subject of a disciplinary proceeding. It has been the contemporaneous and settled administrative construction of the Act to proceed against the owners in circumstances such as are involved here. The "contemporaneous construction of a statute by the officer charged with its enforcement is entitled to great weight." United States v. Zucca, 351 U.S. 91, 96.

personally observed the condition of his feet prior to the DQP's inspection (Tr. 460). He testified (Tr. 461):

> **A.** I thought the horse was in good shape, I thought there was no problem, I thought he was in good enough shape not to have any worry about him at all, I thought the horse was O.K.

Eldon Stamper then watched the warm-up and the exhibition (Tr. 45964). Accordingly, Eldon Stamper had as much opportunity to prevent the violation as respondent Fox. In fact, as between respondent Fox and respondent Eldon Stamper, respondent Stamper had more actual opportunity to prevent the violation than respondent Fox.

Respondent Fox was just 25 years old. He had just started training horses the year before the violation. Respondent Stamper was older and had been involved with Walking Horses longer than respondent Fox. Respondent Stamper also had by his side John Gunn, senior trainer of the horse, who was in his late 60's or early 70's.

If a decision were to be made on September 22, 1979, that "Red Bluff's Playboy" should not be shown, because he was too close to the borderline of being sored by chains as a result of his prior callus build-up and pre-Show warm-up, that decision realistically, should have been made by respondent Stamper, in consultation with John Gunn, rather than respondent Fox, the youngest person there.

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Undoubtedly, the violation here resulted from mistaken judgment. I am satisfied that neither respondent Fox nor respondent Stamper intended to sore "Red Bluff's Playboy." I am equally satisfied that neither of them knew that the horse would be sored that night by the chains.

Unfortunately, however, respondents were wrong. Respondent Fox showed and exhibited the horse while it was sore. Respondent Stamper was present and "allowed" that activity.[39] Both the opportunity to use better judgment and avoid the violation.

As shown above, the ring conditions were not a significant factor here since no other horse exhibited that night was found to be sore. Respondents alone (and John Gunn, who is not subject to the Act as owner or exhibitor) share the blame for their mistaken judgment.

There is no basis for reading into the Act, as to owners or exhibitors, the exculpatory factors set forth in Burton.

V. Sanction.

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39. Even if he had not been physically present, unless the horse was shown without his permission or acquiescence, he would be responsible, as owner, for allowing his horse to be exhibited while sore. Accordingly, respondent Sonya Stamper is also responsible for the violation. However, as shown in the next section, it is appropriate to impose on the Stampers only the civil penalty applicable to a single individual.

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The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, its unfair competitive aspects and its destructive effect on the horse industry, as follows (H. Rep. No. 94-1174, 94th Cong., 2d Sess. 4-5 (1976), reprinted in [1976] 3 U.S. Code Cong. & Ad. News 1696, 1698-99):

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act; It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil of mustard, to the pastern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when

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the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose highstepping gait is achieved artificially by soring suffers from pain and inflammation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses

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Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, .lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

The potential gain to an owner from soring a horse is enormous, through the increased value of a winning horse for sale or breeding purposes[40] (see Hearing before the Senate Subcommittee on Energy, Natural Resources, and the Environment of the Committee on Commerce, 91st Cong., 1st Sess., on S. 2543 (Serial 91-27), at 36; H. Rep. No. 91-1597, 91st Cong., 2d Sess. 3; H. Rep. No. 94-1174, 94th Cong., 2d Sess. 4 (1976)), and the prestige and recognition that come to the owner of a winning horse (In re Thornton, 41 Agric. Dec. 870, 915 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982)). Therefore, the pain to an owner who violates the Act must be great, if the remedial purposes of the Act are to be achieved.

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40. In the present case, respondent Eldon Stamper hoped that a good showing by "Red Bluff's Playboy" would increase the breeding value of his sire, "Goboy's Red Bluff," also owned by the Stampers (Tr. 457, 459, 477).

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Similarly, the potential gain to a trainer from soring horses is substantial. The "training of horses is a very competitive field" (Tr. 444). A trainer who establishes a winning record through soring will be able to attract and retain clients. Accordingly, the pain to a trainer who violates the Act must be great if the remedial purposes of the Act are to be achieved.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to respondents but to other potential violators. This policy has been followed in all of the Departments disciplinary proceedings in recent years. The basis for that policy is set forth at great length in numerous decisions. E.g., In re Worsley, 33 Agric. Dec. 1547, 1556-71 (1974), set forth in Appendix to this Decision.[41]

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41. Severe sanctions issued pursuant to this policy were sustained, e.g., in In re Kafcsak, 39 Agric. Dec. 683, 687 (1980), aff'd, No. 80-3406 (6th Cir. Dec. 18, 1981); In re American Fruit Purveyors, Inc., 38 Agric. Dec. 1372, 1387-1403 (1979), aff'd per curiam, 630 F.2d 370 (5th Cir. 1980), cert. denied, 101 S. Ct. 1701 (1981); In re Gold Bell-I&S Jersey Farms, Inc., 37 Agric. Dec. 1336, 1362-63 (1978), aff'd, No. 78-3134 (D. N.J. May 25, 1979), aff'd mem., 614 F.2d 770 (3d Cir. 1980); In re Mid-States Livestock, Inc., 37 Agric. Dec. 547, 549-51 (1977), aff'd sub nom. Van Wyk v. Bergland, 570 F.2d 701 (8th Cir. 1978); In re Muehlenhaler, 37 Agric. Dec. 313, 330-32, 337-52, aff'd mem., 590 F.2d 340 (8th Cir. 1978); In re Cordele Livestock Co., 36 Agric. Dec. 1114, 1133-34 (1977), aff'd mem., 575 F.2d 879 (5th Cir. 1978); In re Livestock Marketers, Inc., 35 Agric. Dec. 1552, 1561 (1976), aff'd per curiam, 558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); In re Catanzaro, 35 Agric. Dec. 26, 31-32 (1976), aff'd, No. 76-

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In this case the minimum disqualification provisions of the Act should be applied.[42] The disqualification provisions were added in 1976 because "disqualification provides a strong deterrent to subsequent offenses by individuals who have the economic means to pay civil penalties as a cost of doing business" (H. Rep. No. 94-1174, 94th Cong., 2d Sess. 11 (1976), reprinted in [1976] 3 U.S. Code Cong. & Ad. News 1696, 1706).

1613 (9th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467; In re M. & H. Produce Co., 34 Agric. Dec. 700, 750, 762 (1975), aff'd mem., 549 F.2d 830 (D.C. Cir.). cert. denied, 434 U.S. 920 (1977); In re Maine Potato Growers, Inc., 34 Agric. Dec. 773, 796, 801 (1975), aff'd, 540 F.2d 518 (1st Cir. 1976); In re Southwest Produce, Inc., 34 Agric. Dec. 160, 171, 178, aff'd per curiam, 524 F.2d 977 (5th Cir. 1975); In re J. Acevedo & Sons, 34 Agric. Dec. 120, 133, 145-60, aff'd per curiam, 524 F.2d 977 (5th Cir. 1975); In re Marvin Tragash Co., 33 Agric. Dec. 1884, 1913-14 (1974), aff'd, 524 F.2d 1255 (5th Cir. 1975); In re Trenton Livestock, Inc., 33 Agric. Dec. 499, 515, 539-50 (1974), aff'd mem., 510 F.2d 966 (4th Cir. 1975); In re Miller, 33 Agric. Dec. 53, 64-80, aff'd per curiam, 498 F.2d 1088, 1089 (5th Cir. 1974).

42. The disqualification provisions, aided by the 1976 amendments, are as follows (15 U.S.C. § 1825(c)):

> In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

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In explaining why at least the minimum disqualification previsions of the Act should be applied in soring cases under the Horse Protection Act under present industry conditions, it is stated in In re Thornton, 41 Agric. Dec. 870, 920-23 t1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982), quoting from In re Rowland, 40 Agric. Dec. 1934, 1951-52 (1981), appeal docketed, No. 82-3015 (6th Cir. Jan. 8, 1982):

> As set forth above, Congress added the disqualification provisions to serve as a "strong deterrent to subsequent offenses by individuals who have the economic means to pay civil penalties as a cost of doing business." Anyone who has the means to buy a Tennessee Walking Horse, hire a trainer and pay to have the horse exhibited has the economic means to pay the civil penalties provided by the Act, as a cost of doing business.
>
> Moreover, the potential gain from soring a horse is worth the risk, if a disqualification order is not to be imposed. For example, in this case respondent Meadows' horse won the Futurity, which made her the "world champion two year-old Futurity filly for 1978" (Tr. 99). This was largely responsible for increasing her value from $5,000.00 to $20,000.00 (Tr. 285, 361). A winning stallion can become much more valuable because-of its breeding potential.

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Furthermore, horse owners derive great satisfaction from displaying the trophies and ribbons won by their horses. Payment of a relatively modest civil penalty is not even a slap on the wrist to the typical horse owner.

Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In order to achieve the Congressional purpose of the Act, it would seem necessary to impose at least the a minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of his horses to be exhibited while sore.[43]

If the industry is ever "cleaned up" to the point that horse soring is not a widespread practice, it may be appropriate to forego the use of the disqualification provisions in selected cases. But at least under present conditions, the minimum disqualification provisions should be utilized in every Horse Protection Act case. If there are unusually flagrant circumstances, the disqualification order should exceed the minimum authorized by the Act.

Although the disqualification provisions are severe, they do not prevent a person from breeding or training

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43. There is a remote possibility that the circumstances in some particular case, not presently envisaged, might justify a departure from that policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, I can envisage no circumstance presently warranting an exception from this policy.

horses--only from showing or exhibiting them. Accordingly, although a one-year disqualification order imposes severe restrictions on an owner or trainer, it is not the equivalent of a complete suspension order such as is imposed under other regulatory statutes, e.g., the Packers and Stockyards Act (7 U.S.C. § 204) or the Perishable Agricultural Commodities Act (7 U.S.C. § 499h(a)).

In addition to a minimum disqualification order, civil penalties should also be imposed to act as a deterrent to future violations by respondents and others. The Act provides (15 U.S.C. § 1825(b)):

> (b) Civil penalties; review and enforcement
>
> (1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

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With respect to the amount of the civil penalty, the record in most cases has warranted the maximum civil penalty (presently $2,000 for each violation; previously $1,000). In the present case, the violation was extremely grave. This is one of the rare cases where the horse was abused to such an extent that blood-tinged serum oozed from raw and abraded areas on his pasterns.

As explained above, respondents Fox and Eldon Stamper are both culpable since both had the opportunity to prevent the violations by using better judgment. Lack of actual knowledge or intent has never been regarded as a circumstance warranting a reduction in the civil penalty since actual knowledge or intent has never been proven in any case, and if lack of actual knowledge or intent were regarded as a mitigating circumstance, the remedial purpose of the Act would not be achieved.

In an early case under the Horse Protection Act, In re Holcomb 35 Agric. Dec. 1165, 1174 (1976), a lesser civil penalty was imposed against an owner because he had no actual knowledge of the violation. But that policy was changed two months later in In re Whaley, 35 Agric. Dec. 1519, 1527 (1976), in order better to achieve the remedial purposes of the Act. The policy was announced Whaley that "the owner is fully responsible for the conduct of the trainer and, therefore, should not be assessed a lesser penalty merely because he may not have had actual knowledge that the horse was sored" {35 Agric. Dec. at 1527).

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Ability to pay is, of course, one of the relevant factors considered. In re Thornton, 41 Agric. Dec. 870, 895-99 (1982), appeal docketed, No. 82-7187 (11th Cir. June 7, 1982). However, the record in this case does not warrant a determination that the horse's owners are unable to pay a $2,000 civil penalty.

Since the horse's owners in this case are husband and wife, it would seem appropriate to require them jointly to pay a single civil penalty, rather than impose separate civil penalties against each. That is, in the case of married couples, there is no reason for imposing twice the civil penalty on couples who register their horse in both names as is imposed on those who register the horse in one name only.

As to respondent Fox, the record shows that his income and financial means are very modest and, therefore, only a $750 civil penalty should be assessed against him.

Order

Respondent Ross H. Fox is assessed a civil penalty of $750.00.

Respondents Eldon Stamper and Sonya Stamper are jointly assessed a single civil penalty of $2,000.00.

Certified checks or money orders payable to the Treasurer of the United States in payment of the civil

penalties shall be forwarded to the General Counsel, Room 2033, South Building, United States Department of Agriculture, Washington, D.C . 20250, within 60 days from the date this Order becomes final.

Respondents Ross H. Fox, Eldon Stamper and Sonya Stamper are each disqualified from showing or exhibiting any horse, and from judging or managing any horse show, exhibition, or auction for a period of one year (1 year) from the date this Order becomes final.

This Order shall become final as to each respondent 35 days after service on the respondent.

APPENDIX E — PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED MARCH 31, 1995.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 1995 Decided March 31, 1995

No. 93-1852

SHERYL CRAWFORD
Petitioner

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE
Respondent

Petition for Review of an Order of the
United States Department of Agriculture*

John M. Harmon argued the cause and filed the briefs for petitioner.

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* Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of cost out of time.

Appendix E

Jeffrey A. Knishkowy, Attorney, United States Department of Agriculture, argued the cause for respondent. With him on the brief was James M. Kelly, Associate General Counsel, United States Department of Agriculture. Raymond W. Fullerton entered an appearance.

Before: WALD, SILBERMAN and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

SILBERMAN, Circuit Judge: Petitioner, a horse owner, challenges a civil penalty imposed under the Horse Protection Act for "allowing" the entry of a "sored" Tennessee Walking horse in a horse show. We den the petition for review.

I.

Petitioner Sheryl Crawford owns and shows "Supreme Image," a Tennessee Walking horse. Such horses are prized for their distinctive high-stepping gait. Unfortunately, the competitive pressures of the Tennessee Walking horse industry have led some owners to "sore" their horses, inflicting injuries on the horses' forelimbs to alter their gait and improve their performance at horse shows. *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1-2 (D.C. Cir. 1987). Congress responded in 1970 with the Horse Protection Act (HPA or Act), 15 U.S.C. §1821 *et*

seq. (1988), which outlaws such practices.[1] The Act prohibits-with respect to "any horse which is sore"-the "showing or exhibiting," "entering for the purpose of showing or exhibiting in any horse show or horse exhibition," and the "allowing" of the entry, showing or horse exhibition," and the "allowing" of the entry, showing or exhibition of such a horse. 15 U.S.C. § 1824(2)(a)-(d). Per Congress' 1976 amendments to the HPA, the government need not prove intent to sore in order to establish civil-as opposed to criminal-liability.[2] *See Thornton v. United States Dep't of Agriculture*, 715 F.2d 1608, 1511-12911th Cir. 1983).

Petitioner entered "Supreme Image" in the Belfast Lions Club Horse Show in Belfast, Tennessee, on August 1, 1986. Supreme Image was trained by Cecil Jordan;

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1. "Soring" is defined in the HPA as where "an irritating or blistering agent has been applied, internally or externally," "any burn, cut or laceration has been inflicted by a person on any limb of a horse,' 'any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse,' or "any other substance or device has been used" to accomplish soring. 15 U.S.C. § 1821(8)(A)-(D). The Act as amended in 1976 creates a presumption that a horse that "manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" is sore. 15 U.S.C. § 1825(d)(5).

2. The criminal penalties under the Act are for "knowing" violations, 15 U.S.C. § 1825. A party incurring civil liability under 15 U.S.C § 1824 "shall be liable to the United States for a civil penalty of not more than $2,000 for each violation ...," 15 U.S.C. § 1825(b)(1), and "may be disqualified by order of the Secretary, after notice and opportunity for a hearing before the Secretary, from showing or exhibiting" horses or otherwise participating in the horse industry "for a period of not less than one year for the first violation and not less than five years for any subsequent violation." 15 U.S.C. § 1825(c).

petitioner testified that she had specifically instructed Jordan not to sore the horse. petitioner paid the entry fee and intended to ride Supreme Image in the show. Upon Jordan's presentation of the horse to the Designated Qualified Person (DQP) prior to the show, however, Supreme Image was rejected for the competition.[3] Two Department of Agriculture veterinarian, Knowles and Riggins, responsible for monitoring the DQPs and compliance with the Act, then examined Supreme Image and determined that the horse was sore within the Act's definition. The veterinarians recorded their observations.

On September 28, 1990, more than four years after the show, the Administrator of the Animal and Plant Health Inspection Service (APHIS), an agency within the Department, instituted a disciplinary proceeding under the HPA against petitioner for "allowing" the entry of a sored horse in the Belfast show. A hearing was held on June 27, 1991, at which petitioner disputed both whether Supreme Image was sore, and whether Crawford had "allowed" the entry of a sore horse. In his Initial Decision and Order filed January 30, 1992, the ALJ discounted the reliability of the government's supporting documentation establishing that Supreme Image was sore, and dismissed the complaint against petitioner. The ALJ determined the agency did not meet its burden of proving that Supreme Image was "sore";

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3. The DQP is typically a person employed by the horse show to inspect horses and determine if the horses are sore. DQPs are utilized to protect the show management from liability under the Act. See 15 U.S.C. § 1824(3). The DQP here, Charles Thomas, was employed through the National Horse Show Commission.

and he therefore did not reach the question whether Crawford had "allow(ed)" the entry of a sored horse. Although he admitted the reports and affidavits of the Department veterinarians as "probative hearsay," the ALJ found that the documents were not supported by any present recollection, and that the government had presented no corroborating notes or other verification of the accuracy of the veterinarians' examinations. In the absence of independent indicis of trustworthiness of the "hear-say' forms and affidavits, he thought the documents were insufficient to make out the government's case.

The Administrator appealed the Initial Decision to the Department's judicial officer, who vacated the ALJ's decision and remanded, ordering the ALJ to reweigh the evidence of soring. The judicial officer concluded that the ALJ had asked for too much, as the APA contemplates reliance upon past recollections recorded as "reliable, probative and substantial evidence," 5 U.S.C. § 556(d). In his Revised Order of January 29, 1993, the ALJ determined that petitioner entered in a show while the horse was sore." the ALJ assessed a $2,000. civil penalty and disqualified Crawford from showing, exhibiting, entering horses or otherwise participating in horse shows or auctions for one year. Petitioner's appeal to the Department's judicial officer was denied, and this petition for review of the Department's final order followed.

II.

Appendix E

Petitioner raises two arguments. She challenges the Department's finding that the horse was sore as lacking substantial evidence on the whole record, and also disputes the Department's conclusion that she "allowed" the entry of a sored horse - which involves more a question of statutory interpretation than a finding of historical fact. As to the first argument, petitioner urges us, as she did the Department, to reject the documentary evidence prepared by the Department's veterinarians and offered by the Administrator. The very night of the examination in question, however, Dr. Riggins, one of the two examining veterinarians, filled out a departmental for entitled "Summary of Alleged Violations" which described the horse's reaction to the doctor's "digital palpation," i.e., pressing on the horse's forelimbs to test for pain response. The summary report, stating that the horse reacted repeatedly to the palpation with a pain response and diagramming the location of the soreness, was signed by both veterinarians. Shortly thereafter both doctors prepared and signed affidavits describing the examination (Dr. Knowles three days later on August 4, and Dr. Riggins on August 15).

To be sure, at the hearing four years later, neither doctor had an independent recollection of the events. But contrary to petitioner's contention, administrative agencies are not barred from reliance on hearsay evidence. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 405-06 (1971). Such evidence need only bear satisfactory indicia of reliability, *Hoska v. United States Dep't of the Army*, 577 F.2d 131, 138 (D.C. Cir. 1982), and can constitute substantial

evidence if reliable and trustworthy. *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). Nor are the minor inaccuracies in the report - a wrongly recorded digit of the horse's identification number - of such significance as to undermine the document's reliability since the horse was otherwise correctly identified. Four years does seem a long time to await an adjudication. yet the veterinarians, who examine hundreds of horses at many horse shows - as was brought out at oral argument - would likely forget an actual examination in a much shorter period, so the delay did not prejudice petitioner nor does it appear relevant to the hearsay issue.

Petitioner offered her own testimony and that of her husband, her trainer, and a friend, as to the horse's condition and the circumstances surrounding the examination. Of those witnesses only petitioner observed the veterinarians' examination of the horse (it is perhaps noteworthy that after the DQP rejected Supreme Image, the trainer left the examination area). The others merely testified as to alternative reasons for the horse's reaction to diagnosis, that the horse was agitated because it had been transported with a mare in season and that the examination area, where the horse was required to remain for over an hour, was crowded. petitioner herself did observe the veterinarians examine the horse and administer digital palpation three times, but she does not contradict directly the doctors' report. She testified only that neither doctor

told her the horse was sore.[4] But it does not appear that the veterinarians expressed to her any conclusion one way or another.

It is undisputed, then, that the two doctors examined Supreme Image the night of August 1, 1986, after the DQP had rejected the horse for ostensible soreness, and that the doctors' summary report described soreness in the horse's legs per the digital palpation diagnostic procedure. once the veterinarian's reports, which are essential uncontradicted, are determined to be admissible we think it impossible to conclude that the Department's ruling is not supported by substantial evidence on the whole record. Trying another approach to discredit the reports, however, petitioner disputes the reliability of digital palpation, at least by itself, as a method of determining whether a horse is sore - despite a Department regulation, 9 C.F.R. § 11.1 (1990), which explicitly approves that technique. Petitioner relies on Congress, which she points out, has expressed the same concern as does petitioner. In a recent Appropriations Act, Congress included a rider on the Department's appropriation:

> For expenses, . . . to carry out inspection, quarantine, and regulatory activities; . . . *provided further*, that none of these funds shall be used to pay the salary of any Department Veterinarian or Veterinary Medical Officer who, when conducting

4 . She did also claim that she overhear Dr. Riggins tell Dr. Knowles that "he could not find anything wrong," but did not know whether he was referring to only one leg.

> inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies *solely* on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

Pub. L. No. 102-341, 1006 Stat. 873, 881-882 (1992) (emphasis added). It does seem, then, that horse owners were persuasive in making petitioner's argument before Congress, but that was only so after the events that gave rise to this case. Obviously we cannot be influenced by Congress' subsequent actions; the legality of the Department's decision has to be judged by the law in effect at the time of the inspection and the proceeding before the Department. And we have no legitimate basis to reject digital palpation as a diagnostic technique, whether used alone or not, prior to the passage of the appropriations rider.

That brings us to the petitioner's second argument: that on the facts presented, the Department could not conclude that petitioner "allow(ed)" the entry of a sore horse. This textual argument turns on the meaning of the word "allow." The Department contends that an owner can always prevent a horse from being sored, and that therefore an owner is liable if her horse is entered, showed, or exhibited while sore. Petitioner, on the other hand, maintains that the word "allow" necessarily implies knowledge of the sore condition, or at least requires proof of circumstances that would alert the owner that someone -

normally, we would suppose, the trainer - was soring the horse. In this case, it will be recalled, the petitioner testified, without contradiction, that she instructed the trainer not to sore the horse. Petitioner accuses the Department of interpreting the word "allow" so as to create absolute liability for an owner regardless of the circumstances that caused a horse's soreness.

This issue has generated much discussion and concern in our fellow circuits. The Eight Circuit, *Burton v. United States Dep't of Agriculture*, 683 F.2d 280, 282-83 (8th Cir. 1982), and the Sixth Circuit, *Baird v. United States Dep't of Agriculture*, 39 F. 8d 131, 137-38 (6th Cir. 1994), have rejected the Department's interpretation and have held that if an owner produced uncontradicted evidence that he or she instructed a trainer not to sore the horse, the Department must in turn show that the instruction was a ruse or that the owner nevertheless had knowledge that the horse was sore. Compare *Thornton v. united States Dep't of Agriculture*, 715 F .2d 1608, 1511-12 (11th Cir, 1988); see also *Stamper v. Secretary of Agriculture*, 722 F .2d 1483, 1488-89 (9th Cir. 1984).

We respectfully disagree with our sister circuits who have required the Department to produce evidence rebutting an owners' prophylactic instruction. Congress did not state that an owner is liable if she *authorizes or causes* a horse to be sored. The word "allow" is a good deal softer, more passive, and it can have varying meanings, e.g., "to permit by neglecting to restrain or prevent," or "to make a possibility: provide opportunity or basis" or (most strongly)

"to intend or plan." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 58 (1971). Since the word in ambiguous, we are obliged *under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 887, 842-43 (1984), to defer to the Department's interpretation of the term (so long as reasonable), which we take to be among the weaker ones in Webster's, "to permit by neglecting to restrain or prevent." Accordingly, if an owner enters or shows a sore horse, the Department assumes that he or she has not *prevented* someone in his or her employ for soring the horse. And, *by itself*, testimony that the owner "instructed" the trainer not to sore the horse will not exculpate the owner. In so concluding, the Department merely takes into account the obvious proposition that the owner has the power to control his or her agents.

The Sixth Circuit recognized (in a footnote) that *Chevron* governed review of the Department's interpretation, but concluded the Department's interpretation was unreasonable. *Baird*, 39 F.3d at 197 n.10. The court looked to Black's Law Dictionary, which does state that "'allow' has no rigid or precise meaning" but then goes on to say, "(t)o sanction, either directly or indirectly, as opposed to merely suffering a thing to be done" (even that dictionary does, in a contradictory fashion, submit as an alternative," to suffer; to tolerate"). From that language the court concluded that

> [A]s the above definition makes clear, there are basically two ways to allow something to happen:

> either 'directly,' e.g., explicitly condoning or authorizing the conduct or act in question; or 'indirectly,' e.g., by failing to prevent such conduct or act -- in other words, by 'looking the other way' or by 'burying one's head in the sand,'.... Liability would follow in this latter instance if, for example, an owner had cultivated a training atmosphere conducive to soring, or had done nothing to dissuade the practice, knowing the tactics of his trainers in particular and/or the pervasiveness of the practice in general.

Baird v. U.S. Dep't of Agriculture, 89 F.3d at 137.

The Sixth Circuit's interpretation of the language is certainly plausible, but we do not agree with its conclusion that the Department's interpretation is unreasonable or is functionally equivalent to the imposition of absolute liability. The Department merely holds the owner responsible for the actions of her agents (particularly, the trainer) and will not permit the owner to escape liability by testifying that she instructed a trainer not to sore. It might well be an entirely different case -- we have been able to find none -- if an owner were able to show that a horse was sored by a stranger or someone not under the owner's control. And, it is of course conceivable that a trainer would flatly disobey an owner's instruction. If an owner produced such evidence -- together, presumably, with a showing that the trainer had been terminated -- it might well be that the Department could not conclude reasonably that the owner "allowed" the entry of a sore horse. That is not this case, however, and

that apparently has not been the pattern of most of these cases.[5]

The Sixth Circuit recognized the government's concern that an owner could easily offer evidence of a prophylactic instruction without real fear of contradiction (trainers would be unlikely to cross the owners), but the court concluded that this risk was simply a hazard of litigation: the government still had the "burden" of disproving the sincerity of the instruction. Baird, 39 F.3 at 138 n.11. That amounts to putting an enormous burden and expense on the Administrator to establish how the horse came to be sored, a burden that would be required if the statute called for a sanction if an owner "caused" or "authorized" the soring. Since the statute uses the term "allow" (i.e., "permit," or "does not prevent"), we do not think the Administrator must shoulder such a task just because the owner produces evidence of her instruction to the trainer. After all, the instruction is not introduced to establish that the horse was not sore but rather to relieve the owner of any responsibility for the soreness. Yet the instruction, by itself, even were it deemed totally sincere, is not necessarily inconsistent with proposition that the owner "permitted" -- for example, through neglect or lack of vigilance -- the horse to be sored. It is unimaginable that an owner would be unfamiliar with soring practices generally, as well as the Department's enforcement efforts, therefore if an owner's horse were sored, notwithstanding her

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5. But see Baird, 39 F.3d at 138, where it was at least shown that the owner had taken horses away from trainers engaged in soring.

instruction, she could be said to have "put her head in the sand" -- unless something quite extraordinary occurred.

The Department apparently believes that an owner can and must do a good deal more than simply give the bare instruction to be thought to have "prevented" her own horse from being entered in a sore condition. The issue does not involve so much an allocation of burdens, as the Sixth Circuit thought,[6] but rather the weight the Department must give to evidence of the owner's instruction in light of the Department's interpretation of the statute. We do not think, in that context, it is unreasonable for the Department to conclude that such an instruction will not exculpate an owner for the statutory responsibility for allowing the entry of a sore horse.

* * * * *

For the aforementioned reasons, the petition for review of the Department's order is hereby denied.

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6. *Compare Director, OWCP v. Greenwich Colliaries*, 114 S.Ct. 2251, 2257-59 (1994) (discussing agency's "burden of persuasion" and production under APA and substantive statute).

APPENDIX F — RELEVANT STATUTORY PROVISIONS -HORSE PROTECTION ACT, 15 U.S.C.A.§ 1821 - 1831

CHAPTER 44. PROTECTION OF HORSES

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§ 1821. Definitions

As used in this Act [15 USCS §§1821 et seq.] unless the context otherwise requires:

(1) The term "management" means any person who organizes, exercises control over, or administers or who is responsible for organizing, directing, or administering.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "sore" when used to describe a horse means that —

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(Dec. 9, 1970, P. L. 91-540, § 2, 84 Stat. 1404; July 13, 1976, P. L. 94-360, § 3, 90 Stat. 915)

§ 1822. Congressional statement of findings

The Congress finds and declares that —

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this Act [15 USCS §§ 1821 et seq.] are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this Act [15 USCS §§ 1821 et seq.] by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

(Dec. 9, 1970, P. L. 91-540, § 3, 84 Stat. 1405; July 13, 1976, P. L. 94-360, § 4, 90 Stat. 915.)

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses. The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) or by the Secretary that the horse is sore.

(b) Prohibited activities. The management of any horse sale or auction shall prohibit the sale or auction or exhibition for the purpose of sale of any horse (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) or by the Secretary that the horse is sore.

(c) Appointment of inspectors; manner of inspections. The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show,

horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this Act [15 USCS §§ 1821 et seq.]. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e).

(d) Recordkeeping and reporting requirements; availability of records. The management of a horse show, horse exhibition, or horse sale or auction shall establish and maintain such records, make such reports, and provide such information as the Secretary may by regulation reasonably require for the purposes of implementing this Act [15 USCS §§ 1821 et seq.] or to determine compliance with this Act [15 USCS §§ 1821 et seq.]. Upon request of an officer or employee duly designated by the Secretary, such management shall permit entry at all reasonable times for the inspection and copying (on or off the premises) of records required to be maintained under this subsection.

(e) Inspection by secretary or duly appointed representative. For purposes of enforcement of this Act [15 USCS §§ 1821 et seq.] (including any regulation promulgated under this Act [15 USCS §§ 1821 et seq.]) the Secretary, or any representative of the Secretary duly

designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this Act [15 USCS §§ 1821 et seq.] have been complied with.
(Dec. 9, 1970, P.L. 91-540, § 4, 84 Stat. 1405; July 13, 1976, P.L. 94-360, § 5, 90 Stat. 916.)

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which I sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown, or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any

horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

(3) The failure by the management of any horse show or horse exhibition, which does not appoint and retain a person in accordance with section 4(c) of this Act [15 USCS § 1823(c)], to disqualify from being shown or exhibited any horse which is sore.

(4) The failure by the management of any horse sale or auction, which does not appoint and retain a qualified person in accordance with section 4(c) of this Act [15 USCS § 1823(c)], to prohibit the sale, offering for sale, or auction of any horse which is sore.

(5) The failure by the management of any horse show or horse exhibition, which has appointed and retained a person in accordance with section 4(c) of this Act [15 USCS § 1823(c)], to disqualify from being shown or exhibited any horse (A) which is sore, and (B) after having been notified by such person or the Secretary that the horse is sore or after otherwise having knowledge that the horse is sore.

(6) The failure by the management of any horse sale or auction which has appointed and retained a person in accordance with section 4(c) of this Act [15 USCS § 1823(c)], to prohibit the sale, offering for sale, or auction of any horse (A) which is sore, and (B) after having been notified by such person or the Secretary or after otherwise having knowledge that the horse is sore.

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 9 [15 USCS § 1828] prohibits to prevent the soring of horses.

(8) The failing to establish, maintain, or submit records, notices, reports, or other information required under section 4 [15 USCS § 1823].

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 4 [15 USCS § 1823].

(10) The removal of any marking required by the Secretary to identify a horse as being detained.

(11) The failure or refusal to provide the Secretary with adequate space or facilities, as the Secretary may by regulation under section 9 [15 USCS § 1828] prescribe, in which to conduct inspections or any other activity authorized to be performed by the Secretary under this Act [15 USCS §§ 1821 et seq.].

(Dec. 9, 1970, P. L. 91-540, § 5, 84 Stat. 1405; July 13, 1976, P. L. 94-360, § 6, 90 Stat. 916.)

§ 1825. Violations and penalties

(a) Criminal acts and penalties. (1) Except as provided in paragraph (2) of this subsection, any person who

knowingly violates section 5 [15 USCS § 1824] shall, upon conviction thereof, be fined not more than $3,000, or imprisoned for not more than one year, or both.

(2)(A) If any person knowingly violates section 5 [15 USCS § 1824], after one or more prior convictions of such person for such a violation have become final, such person shall, upon conviction thereof, be fined not more than $5,000, or imprisoned for not more than two years, or both.

(B) Any person who knowingly makes, or causes to be made, a false entry or statement in any report required under this Act [15 USCS §§ 1821 et seq.]; who knowingly makes, or causes to be made, any false entry in any account, record, or memorandum required to be established and maintained by any person or in any notification or other information required to be submitted to the Secretary under section 4 of this Act [15 USCS § 1823]; who knowingly neglects or fails to make or cause to be made, full, true, and correct entries in such accounts, records, memoranda, notification, or other materials; who knowingly removes any such documentary evidence out of the jurisdiction of the United States; who knowingly mutilates, alters, or by any other means falsifies any such documentary evidence; or who knowingly refuses to submit any such documentary evidence to the Secretary for inspection and copying shall be guilty of an offense against the United States, and upon conviction

thereof shall be fined not more than $5,000, or imprisoned for not more than three years, or both.

(C) Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this Act [15 USCS §§ 1821 et seq.] shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this Act [15 USCS §§ 1821 et seq.] shall be punishable as provided under sections 1111 and 1112 of title 18, United States Code [18 USCS §§ 1111, 1112].

(b) **Civil penalties; review and enforcement.** (1) Any person who violates section 5 of this Act [15 USCS § 1824] shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any

history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

(3) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(4) The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection.

(c) **Disqualification of offenders; orders; civil penalties applicable; enforcement procedures.** In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) o who paid a civil penalty assessed under subsection (b) or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this Act [15 USCS §§ 1821 et seq.] or any regulation issued under this Act [15 USCS §§ 1821 et seq.] may be disqualified by order of the Secretary, after notice and an opportunity for a disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of

an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) **Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction.** (1) the Secretary may require by subpena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding. Witnesses summoned before the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(2) The attendance of witnesses, and the production of books, papers, and documents, may be required at any designated place from any place in the United States. In case of disobedience to a subpena the Secretary, or any party to a proceeding before the Secretary, may invoke the aid of any appropriate district court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this Act [15 USCS §§ 1821 et seq.].

(3) The Secretary may order testimony to be taken by deposition under oath in any proceeding or investigation pending before him, at any stage of the investigation. Depositions may be taken before any person designated by the Secretary who has power to administer oaths. The Secretary may also require the

production of books, papers, and documents at the taking of depositions.

(4) Witnesses whose depositions are taken and the persons taking them shall be entitled to the same fees as paid for like services in the courts of the United States or in other jurisdictions in which they may appear.

(5) In any civil or criminal action to enforce this Act [15 USCS §§ 1821 et seq.] or any regulation under this Act [15 USCS §§ 1821 et seq.] a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

(6) The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this Act [15 USCS §§ 1821 et seq.], and shall have jurisdiction in all other kinds of cases arising under this Act [15 USCS §§ 1821 et seq.], except as provided in subsection (b) of this section.

(e) **Detention of horses; seizure and condemnation of equipment.** (1) The Secretary may detain (for a period not to exceed twenty-four hours) for examination, testing, or the taking of evidence, any horse at any horse show, horse exhibition, or horse sale or auction which is sore or which the Secretary has probable cause to believe is sore. The Secretary may require the temporary marking of any horse during the period of its detention for the purpose of identifying the horse as detained. A horse which is detained subject to this

paragraph shall not be moved by any person from the place it is so detained except as authorized by the Secretary or until the expiration of the detention period applicable to the horse.

(2) Any equipment, device, paraphernalia, or substance which was used in violation of any provision of this Act [15 USCS §§ 1821 et seq.] or any regulation issued under this Act [15 USCS §§ 1821 et seq.] or which contributed to the soring of any horse at or prior to any horse show, horse exhibition, or horse sale or auction, shall be liable to be proceeded against, by process of libel for the seizure and condemnation of such equipment, device, paraphernalia, or substance, in any United States district court within the jurisdiction of which such equipment, device, paraphernalia, or substance is found. Such proceedings shall conform as nearly as possible to proceedings in rem in admiralty.

(Dec. 9, 1970, P. L. 91-540, § 6, 84 Stat. 1406; July 13, 1976, P. L. 94-360, § 7, 90 Stat. 918.)

§ 1826. Notice of violations to Attorney General

Whenever the Secretary believes that a willful violation of this Act [15 USCS §§ 1821 et seq.] has occurred and that prosecution is needed to obtain compliance with the Act [15 USCS §§ 1821 et seq.], he shall inform the Attorney General and the Attorney General shall take such action with respect such matter as he deems appropriate.

(Dec. 9, 1970, P. L. 91-540, § 7, 84 Stat. 1406.)

§ 1827. Utilization of personnel of Department of Agriculture and officers and employees of consenting

Appendix F

States; technical and other nonfinancial assistance to State

(a) The Secretary, in carrying out the provisions of this Act [15 USCS §§ 1821 et seq.], shall utilize, to the maximum extent practicable, the existing personnel and facilities of the Department of Agriculture. The Secretary is further authorized to utilize the officers and employees of any State, with its consent, and with or without reimbursement, to assist him in carrying out the provisions of this Act [15 USCS §§ 1821 et seq.].

(b) The secretary may, upon request, provide technical and other nonfinancial assistance (including the lending of equipment on such terms and conditions as the Secretary determines is appropriate) to any State to assist it in administering and enforcing any law of such State designed to prohibit conduct described in section 5 [15 USCS § 1824].

(Dec. 9, 1970, P. L. 91-540, § 8, 84 Stat. 1406; July 13, 1976, P. L. 94-360, § 8, 90 Stat. 920.)

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this Act [15 USCS §§ 1821 et seq.].

(Dec. 9, 1970, P. L. 91-540, § 9, 84 Stat. 1406.)

§ 1829. Preemption of State laws; concurrent jurisdiction; prohibition on certain State action

No provisions of this Act [15 USCS §§ 1821 et seq.] shall be construed as indicating an intent on the part of the

Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. Nor shall any provision of this Act [15 USCS §§ 1821 et seq.] be construed to exclude the Federal Government from enforcing the provision of this Act [15 USCS §§ 1821 et seq.] within any State, whether or not such State has enacted legislation on the same subject, it being the intent of the Congress to establish concurrent jurisdiction with the States over such subject matter. In no case shall any such State take any action pursuant to this section involving a violation of any such law of that State which would preclude the United States from enforcing the provisions of this Act [15 USCS §§ 1821 et seq.] against any person.
(Dec. 9, 1970, P. L. 91-540, § 10, 84 Stat. 1406)

§ 1830. Report to the Congress

On or before the expiration of thirty calendar months following the date of enactment of this Act [enacted Dec. 9, 1970], and every twelve calendar months thereafter, the Secretary shall submit to the Congress a report upon the matters covered by this Act [15 USCS §§ 1821 et seq.], including enforcement and other actions taken thereunder, together with such recommendations for legislative and other action as he deems appropriate.
(Dec. 9, 1970, P. L. 91-540, § 11, 84 Stat. 1406; July 13, 1976, P. L. 94-360, § 9, 90 Stat. 920.)

Appendix F

§ 1831. Authorization of appropriations

There are authorized to be appropriated to carry out this Act [15 USCS §§ 1821 et seq.] $125,000 for the period beginning July 1, 1976, and ending September 30, 1976; and for the fiscal year beginning October 1, 1976, and for each fiscal year thereafter there are authorized to be appropriated such sums, not to exceed $500,000, as may be necessary to carry out this Act [15 USCS §§ 1821 et seq.]. (Dec. 9, 1970, P. L. 91-540, § 12, 84 Stat. 1407; July 13, 1976, P. L. 94-360, § 10, 90 Stat. 921.)

Supreme Court, U.S.
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No. 94-2133

In the Supreme Court of the United States

OCTOBER TERM, 1995

SHERYL CRAWFORD, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the administrative finding that a horse owned by petitioner was "sore" at the time of its entry into a horse show, in violation of the Horse Protection Act, 15 U.S.C. 1821 *et seq.*

2. Whether substantial evidence supported the administrative finding that petitioner "allowed" the entry of a "sore" horse in violation of the Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 130a-143a) is reported at 50 F.3d 46. The final decision of the United States Department of Agriculture (USDA) Judicial Officer (Pet. App. 53a-129a) is not yet reported. The revised decision of the Administrative Law Judge (Pet. App. 25a-52a) is not yet reported. The initial decisions of the USDA (Pet. App. 21a-24a) and the ALJ (Pet. App. 1a-20a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1995. The petition for a writ of certiorari was filed on June 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Tennessee Walking horses are prized at horse shows for their distinctive, high-stepping gait, a "walk" typically achieved through a combination of careful training and the horse's natural breeding. Competitive industry pressures, however, have led some horse owners to inflict injuries on the forelimbs of such horses that induce the horses to adopt such a gait. Specifically, when a horse's front feet are deliberately made sore, either through the application of chemicals or by making cuts, burns, or lacerations, "the intense pain which the animal suffer[s] when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking horse. H.R. Rep. No. 1597, 91st Cong., 2d Sess. 2 (1970); see also Pet. App. 131a.

In 1970, Congress enacted the Horse Protection Act (HPA), 15 U.S.C. 1821-1835 (*reprinted in part* at Pet. App. 144a-161a), to end the practice of "soring" horses. Congress had two reasons for prohibiting that practice. First, soring inflicts great pain on the horse. Second, owners and trainers who sore their horses gain an unfair competitive advantage over those who rely on skill and patience. H.R. Rep. No. 1174, 94th Cong., 2d Sess. (1976). See *Elliott* v. *Administrator, Animal Plant and Health Inspection Serv.*, 990 F.2d 140, 144-145 (4th Cir.), cert.

denied, 114 S. Ct. 191 (1993); *Thornton* v. *United States Dep't of Agriculture*, 715 F.2d 1508, 1511-1512 (4th Cir. 1983).

The HPA prohibits a number of practices with respect to "any horse which is sore." 15 U.S.C. 1824(2). These include "showing or exhibiting" any such horse, 15 U.S.C. 1824(2)(A); "entering for the purpose of showing or exhibiting in any horse show or horse exhibition" any such horse, 15 U.S.C. 1824-(2)(B); and "allowing" any such entry, showing, or exhibition, 15 U.S.C. 1824(2)(D). The Act states that a horse is "sore" where

> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result * * * such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving * * * .

15 U.S.C. 1821(3).

In 1976, Congress amended the Act to make clear that, to establish a violation of the Act, the government need not prove that the owner (or trainer) intended to make a horse sore. 15 U.S.C. 1821(3). By thus ensuring that the inquiry under the Act focuses on the entry of a sore horse in competition and not on the intent of the horse's owner, Congress sought to "make it impossible for persons to show sored horses." H.R. Rep. No. 1597, *supra*, at 3. The 1976 amendments to the Act also provide that a horse that "manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" is presumed to be sore. 15 U.S.C. 1825(d)(5). See *Elliott*, 990 F.2d at 144-145; *Thornton*, 715 F.2d at 1511.

The Act provides for both civil and criminal penalties for persons who engage in prohibited acts with regard to a horse which is sore. 15 U.S.C. 1825. A civil violation, as in this case, is punishable by a penalty of not more than $2,000. 15 U.S.C. 1825(b)(1). In addition, a violator may, after notice and a hearing, be disqualified from showing or exhibiting any horse for a period of not less than one year for the first violation and not less than five years for any subsequent violation. 15 U.S.C. 1825(c).

To ensure effective enforcement of the Act, USDA regulations require that each horse be inspected by a representative of the USDA Veterinary Services before it enters any horse show or exhibition. 9 C.F.R. 11.4. "Inspection" means the examination of a horse "by use of whatever means are deemed appropriate and necessary for the purposes of determining compliance with the Act and regulations." 9 C.F.R. 11.1. The examination may include visual examination; physical examination, including touching,

rubbing, palpating and observation of vital signs; and the use of diagnostic devices or instruments. *Ibid.*

2. a. Petitioner owns and shows "Supreme Image," a Tennessee Walking horse, which she entered in a show in Belfast, Tennessee in August 1986. Pet. App. 131a-132a. The horse was trained by Cecil Jordan, whom petitioner testified she had specifically instructed not to sore the horse. Petitioner paid the entry fee and intended to ride Supreme Image in the show. *Id.* at 132a-133a. Upon Jordan's presentation of Supreme Image to a show representative (the Designated Qualified Person (DQP)) before the show, however, the horse was rejected for competition.[1] Two USDA veterinarians responsible for monitoring compliance with the Act then examined Supreme Image and determined that the horse was sore within the Act's definition. The veterinarians recorded their observations. *Id.* at 133a. Their examination consisted, first, of observing the horse's reaction to their digital palpation of its front pasterns (*id.* at 75a), and second, of their observation of the horse's "way of going." *Id.* at 84a. The veterinarians found Supreme Image's way of going only as "fair," because the horse was reluctant to be led, and did not lead with a loose rein and walk normally. *Ibid.*

b. In September 1990, USDA instituted a disciplinary proceeding against petitioner for "allowing" the entry of a sored horse, in violation of 15 U.S.C.

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[1] The DQP is typically employed by the horse show to inspect horses and determine if they are sore and thus to protect the show management from liability under the Act. Pet. App. 133a n.3.

1824(2)(D).[2] Following a hearing, the ALJ found USDA's proof insufficient and dismissed the complaint. The ALJ noted that the two USDA veterinarians no longer recalled their examinations of Supreme Image four years earlier, and found the veterinarians' reports of those examinations to be unreliable hearsay. Pet. App. 10a-19a. The USDA's Judicial Officer, however, vacated the decision dismissing the complaint, and remanded to the ALJ. The Judicial Officer noted that the Administrative Procedure Act authorizes the use of evidence of a witness's "past recollection recorded" as reliable, probative, and substantial, 5 U.S.C. 556(d), provided that such recordings were made while the events recorded were fresh in the witness's mind. Pet. App. 21a-22a. Because the veterinarians had filled out their reports on Supreme Image's condition while their examinations were still fresh in their minds, the Judicial Officer held, the ALJ had erred in rejecting those reports as unreliable. *Id.* at 23a-24a.

On remand, the ALJ determined that petitioner had allowed the entry of a sore horse, in violation of 15 U.S.C. 1824(2)(D), assessed a $2,000 civil penalty on petitioner, and disqualified petitioner from showing or exhibiting horses for one year. Pet. App. 25a-52a. The Judicial Officer adopted the ALJ's decision and

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[2] The trainer, Jordan, agreed to entry of a consent decision and order regarding this horse, and was disqualified from show-related activities for 18 months. See *In re Cecil Jordan*, HPA Docket No. 91-23 (Apr. 17, 1991).

order as the Department of Agriculture's final decision and order. *Id.* at 53a-129a.[3]

c. The court of appeals denied petitioner's petition for review. It found that the Department's decision and order were supported by substantial competent evidence, on both the question whether the horse was sore and whether petitioner had "allowed" the entry of a sore horse within the meaning of the Act. Pet. App. 135a-143a.

ARGUMENT

Petitioner claims that the court of appeals erred both in upholding the finding below that Supreme Image was sore (Pet. 6-12) and in holding that petitioner had "allowed" the entry of a sore horse in a horse show in violation of 15 U.S.C. 1824(2)(D) (Pet. 13-18). The court of appeals' rulings on both issues were correct, and they do not conflict with any other decision. Review is therefore not warranted.

1. Petitioner argues first (Pet. 6-12) that the finding that Supreme Image was sore when entered in the show was not supported by substantial evidence. In making that argument, petitioner argues both that USDA improperly relied on the two veterinarians' reports regarding their examinations of the horse, and that USDA erred in basing its decision solely on the results of digital palpation of the horse. Both arguments lack merit.

a. As the court of appeals noted (Pet. App. 135a), administrative agencies may rely on hearsay evidence such as the written reports of experts, provided that

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[3] The Secretary has delegated to the Judicial Officer authority to render the Department's final decisions in these matters. 7 C.F.R. 2.35.

such evidence bears satisfactory indicia of reliability. See *Richardson* v. *Perales*, 402 U.S. 389, 405-406 (1971). The reports in this case satisfied that standard. As the court of appeals noted (Pet. App. 137a), it is undisputed that the two veterinarians examined Supreme Image after the show's DQP had rejected the horse based on soreness he detected in the horse's legs. After examining the horse, the veterinarians memorialized their findings in writing. That practice is sensible, if not necessary, given that USDA veterinarians examine numerous horses every year[4] and cannot be expected to recall the details of any particular examination after the passage of many months. See *id.* at 135a-136a.[5]

Moreover, it was undisputed that the veterinarians' reports were executed soon after the examinations. The summary of alleged violations, admitted without objection by petitioner (Tr. 41; C.A. Supp. App. 5), was prepared the same night as the examinations (Pet. App. 60a); one of the veterinarians' affidavits was executed just three days after the show and was probably written the morning of the show (*id.* at 61a); and the affidavit of the other veterinarian was signed two weeks after the show, but was based on notes made "while the events were fresh in the minds of the

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[4] Of the two veterinarians in this case, one had inspected 1,000 horses during a 14-year period, and the other had inspected between 6,300 and 9,600 horses during a 12-year period. Pet. App. 80a.

[5] Given the likelihood that the veterinarians would have proven unable to recall the results of their examination of Supreme Image even several months after that examination, the court of appeals concluded that petitioner had not been prejudiced by the fact that USDA did not file its proceeding against her for four years. Pet. App. 136a.

veterinarians." *Id.* at 23a, 60a-62a; Tr. 54, 69; 2 C.A. App. 21, 24. Indeed, the USDA Judicial Officer found that the documentation supporting the charges was prepared either while events were fresh in the veterinarians' minds, or from notes made while events were fresh in a veterinarian's mind. Pet. App. 23a, 86a-88a. Given that no evidence presented by petitioner contradicted the reports (*id.* at 136a-137a), the court of appeals was correct to find that it was "impossible to conclude that the Department's ruling is not supported by substantial evidence on the whole record" (*id.* at 137a).[6]

Relying on cases governed by Federal Rule of Evidence 803, petitioner also argues (Pet. 9-10) that the reports should be discounted because they were prepared in anticipation of these administrative proceedings. However, as petitioner concedes (Pet. 10), the Federal Rules of Evidence do not apply in administrative proceedings. *Richardson*, 402 U.S. at 407-408; *Calhoun* v. *Bailar*, 626 F.2d 145, 150 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981). Moreover, petitioner had the opportunity to cross-examine the two USDA veterinarians and to probe whether the prospect of administrative proceedings had any tendency to affect the manner in which they reported their findings and opinions. Petitioner also could have attempted to show that the prospect of administrative proceedings generally skews the reports of USDA veterinarians, rendering those reports unreliable. Petitioner, however, made no such showing; nor has she supplied any non-speculative basis for

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[6] The court (Pet. App. 136a) found the "minor inaccuracies" which petitioner now assails in the reports (see Pet. 10-11) to be of insufficient significance to undermine the reports.

doubting the reliability of the veterinarians' reports. Finally, petitioner's argument would effectively bar use of such reports in administrative proceedings altogether. That result—which would be contrary to this Court's decision in *Richardson* v. *Perales*, *supra*—is not mandated by any law or applicable rule of evidence, and would seriously undermine enforcement of the HPA.

b. Petitioner also contends (Pet. 11-12) that it is inherently unreliable to find a horse to be sore based solely on the results of digital palpation—*i.e.*, the fact that a horse has exhibited pain in response to manual probing of its forelegs. This case, however, does not present that issue, because the veterinarians' finding of soreness was based not only on the results of palpation, but also on the veterinarians' appraisal of the horse's "way of going" as only "fair," meaning that the horse was reluctant to be led, and did not lead with a loose rein and walk normally. Pet. App. 84a.[7]

2. Petitioner also argues (Pet. 13) that the fact that she allegedly instructed her trainer not to sore her horse precludes civil action against her for having "allowed" the entry in a show of a sore horse. But petitioner did more here than merely not prevent the entry of a sore horse; petitioner paid Supreme Image's entry fee herself and was going to ride the horse. Pet. App. 132a-133a. Petitioner relies on two

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[7] For this reason, the fact that Congress in 1992 restricted the use of federal funds to pay the salaries of veterinarians who rely solely on digital palpation (see Pet. 11-12; Pet. App. 137a-138a) is irrelevant. In any event, that legislation was enacted after the examination of Supreme Image, and, as the court of appeals held (*id.* at 138a), cannot apply retroactively to proceedings based on that examination.

cases in which courts held that owners who instructed their trainers not to "sore" a horse could not be held liable for the entry of that horse absent proof of knowledge of the horse's soreness. But in neither of those cases was the owner both on the scene and prepared herself to ride the sore horse. See *Burton* v. *United States Dep't of Agriculture*, 683 F.2d 280, 281-282 (8th Cir. 1982) (owner not even present at one show, and did not ride at either show); *Baird* v. *United States Dep't of Agriculture*, 39 F.3d 131 (6th Cir. 1994) (no indication that owner was present at shows or that he rode either horse).[8] Indeed, petitioner herself acknowledges that *Burton* and *Baird* are limited to the situation in which the horse owner

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[8] *Burton* and *Baird* are distinguishable from this case in other respects as well. *Burton* set out a three-prong test for owners to satisfy in order to defeat an allegation of "allowing" a sore horse. Petitioner fails to meet the first two parts of that test, because there is neither (1) a finding that she lacked knowledge that the horse was sored, or (2) a finding that a DQP had examined and approved the horse before entering the ring. Petitioner meets only the third part of the test: the existence of her uncontradicted testimony that she directed the trainer not to sore the horse. See *Burton*, 683 F.2d at 283. In *Baird*, the court found that Baird had "actually attempted to prevent, rather than allow, the exhibition or entry of his horses while they were sore." 39 F.2d at 132. That finding was based on Baird's testimony that he would take horses away from trainers he suspected of contravening his directive not to sore horses, and that both trainers involved understood his opposition to soring. *Id.* at 138. In this case, by contrast, there has been no such finding of an attempt by petitioner to prevent soring; instead, the record consists simply of petitioner's uncorroborated claim that she had "instructed her employee who trained 'Supreme Image' not to allow any harm, including soring, to her horse." Pet. App. 64a.

has undertaken no "affirmative act" to facilitate the horse's entry. Pet. 17.

The two other cases on which petitioner relies did not squarely address the issue of when an owner who has directed a trainer not to sore a horse can be liable for "allowing" the horse's entry into a show. See *Thornton* v. *United States Dep't of Agriculture*, 715 F.2d 1508, 1512 n.5 (11th Cir. 1983) (where facts showed merely that owner did not give trainer "a positive direction to sore," court declines to resolve issue, while stating that it is "inclined to agree with *Burton*"); *Stamper* v. *Secretary of Agriculture*, 722 F.2d 1483, 1489 (9th Cir. 1984) (court declines to decide issue because record disclosed no directive by owner not to sore horses). Petitioner's claim (Pet. 17) that her position is supported by a "general consensus among the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits" therefore is not correct.[9]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner cites no decision of the Fifth Circuit on the issue of owner liability for "allowing" the entry of a sore horse.